CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1935

No. 125

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

vs.

MATTHEW BROWN, TRUSTEE.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

PETITION FOR CERTIORARI FILED JUNE 13, 1935.

CERTIORARI GRANTED OCTOBER 14, 1935.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1935

No. 125

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

vs.

MATTHEW BROWN, TRUSTEE.

ON WRIT OF CERTIORARI TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, COMMONWEALTH OF MASSACHUSETTS.

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Supreme Court of the United States.

OCTOBER TERM, 1935.

No.

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, TRUSTEE,
RESPONDENT.

TRANSCRIPT OF RECORD OF MUNICIPAL COURT.

WRIT.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. AT THE MUNICIPAL COURT OF THE CITY OF BOSTON, holden at said Boston, within the County of Suffolk, for civil business, on the tenth day of June, A. D., 1933.

Matthew Brown, Trustee in Bankruptcy of the Metropolitan Builders' Supply Company----------Plaintiff,

vs.

Palmer Clay Products Company, a corporation, Defendant.
the Plaintiff appears and enters his action in the words following, to wit:—

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss.

To the Sheriffs of our several Counties, or their Deputies, or any constable of any City or Town within our said Commonwealth:

(L. S.)_____ GREETING.

WE COMMAND you to attach the goods or estate of Palmer Clay Products Company, a corporation duly organized by law and having an usual place of business in Boston, in our County of Suffolk, to the value of Four Thousand Dollars; and summon the said Defendant (if he may be found in your precinct,) to appear before our Justices of the Municipal Court of the City of Boston, to be holden at Boston, within our County of Suffolk, for civil business, on Saturday, the 10th day of June, A. D., 1933, at nine of the clock in the forenoon; then and there to answer to Matthew Brown, Trustee in Bankruptcy of the Metropolitan Builders' Supply Company, a corporation duly organized by law and having an usual place of business in Chelsea, in the County of Suffolk,_____ in an action of contract_____ To the damage of the said Plaintiff, (as he says) the sum of Four Thousand Dollars, as shall then and there appear, with other due damages. And have you there this Writ with your doings therein.

WITNESS, WILFRED BOLSTER, ESQUIRE, at Boston aforesaid, the 23rd day of May, in the year of our Lord one thousand nine hundred and thirty-three.

WILLIAM F. DONOVAN, *Clerk.*

Upon which is the following, to wit:—

"SUFFOLK, ss. BOSTON, June 3, 1933.

By virtue of this Writ, I this day attached a chip as the property of the within-named defendant corporation, PALMER CLAY PRODUCTS COMPANY, and afterwards on the same day summoned it to appear and answer at Court as within directed by delivering to C. A. PALMER, its Secretary and the officer in charge of its business, a summons, to-

gether with an attested copy of this Writ, and in the service hereof it was necessary and I actually used a motor vehicle 5 miles.

FEES:		
	Service	$1.00
	Copy	.50
	Travel	.50
	Motor Vehicle	.75
		$2.75

JOHN H. HORGAN,
Deputy Sheriff."

DOCKET ENTRIES.

DECLARATION filed at time of entry—copy herewith annexed. (as amended)

And the further consideration of said action is thence adjourned to the thirteenth day of June, A. D., 1933.

And on the said thirteenth day of June, the said Defendant corporation files its answer. — copy herewith annexed.

And the further consideration of said action is thence continued or adjourned from time to time until the twenty-first day of November, A. D., 1933.

And on the fourteenth day of said June, Interrogatories to Plaintiff filed.

And on July eighteenth, A. D., 1933, Plaintiff ordered to Answer Interrogatories on or before July 28, 1933, or non-suit to be recorded.

And on said twenty-eighth day of July, Plaintiff nonsuited.

And on the twenty-ninth day of said July, Non-suit off and Plaintiff answers Interrogatories by consent.

And on the second day of August, 1933, Defendant's motion for further answers filed.

And on the nineteenth day of September, 1933, Interrogatories to Defendant.

And on the ninth day of October, 1933, motion to default filed.

And on the thirteenth day of said October, Defendant

ordered to answer Interrogatories on or before October 23, 1933; or a default to be recorded.

And on the said twenty-third day of October, Defendant defaulted.

And on the twenty-seventh day of said October, Judgment for Plaintiff for $2,231.93 Damages and Costs $9.75.

And on the fourth day of November, 1933, Judgment vacated and Default removed and answers to Interrogatories filed by consent.

And on the sixteenth day of said November, Motion to Amend Declaration filed.

And on the said sixteenth day of November, motion to assign for trial.

And on the twenty-first day of November, Trial had. Motion to Amend Declaration allowed. Plaintiff files further Answers to Interrogatories. Both parties file Requests for Rulings.

And on the said twenty-first day of November, said action Continued for Advisement. Dowd, J.

And on the fifteenth day of December, 1933, Court finds for Plaintiff in the sum of $1,033.38 and interest from date of writ. Memo. of Rulings and Findings filed.

And on the eighteenth day of said December, Defendant files Motion for New Trial.

And on the said eighteenth day of December, Defendant files Request for Report.

And on the twentieth day of said December, Defendant files Draft Report.

And on the tenth day of January, 1934, Defendant files Motion.

And on the thirteenth day of said January, after hearing on Plaintiff's motion to reopen case for submission of further evidence, the Court revokes findings heretofore made and finds for Plaintiff in the sum of $1,688.29, with interest from date of writ. Memo. of Rulings and Findings filed.

And on the fifteenth day of said January, Defendant files Request for Report.

And on the sixteenth day of said January, Defendant files Draft Report.

And on the twenty-first day of February, 1934, Defendant waives motion for new trial by Leave of Court. Dowd, J.

And on the twenty-fourth day of March, 1934, Report filed and allowed.

And on the thirty-first day of said March, Defendant files Copies of Report.

And on the second day of April, 1934, Plaintiff files Briefs.

And on the fourth day of said April, Defendant files Briefs.

And on the fifth day of said April, Amendment to Report filed and allowed.

And on the ninth day of said April, Arguments on Report, Decision reserved.

And on the sixteenth day of May, 1934, Report Dismissed by order of the Appellate Division. Opinion on file.

And on the eighteenth day of said May, Defendant files Claim of Appeal to the Supreme Judicial Court.

And on the twenty-eighth day of May, 1934, Defendant files Request to Report, record for appeal, etc.

And on the said twenty-eighth day of May, Notice to Defendant that $85.- is estimated cost of preparing record for Appeal to Supreme Judicial Court.

And on the thirteenth day of June, 1934, on Defendant's motion time for perfecting Appeal extended to June 27, 1934, inclusive, by Appellate Division.

And on the twenty-fifth day of June, 1934, Defendant deposits $85.- to perfect Appeal to Supreme Judicial Court.

And on the eighth day of August, 1934, Notice to Defendant of readiness of copies of record for entry in Supreme Judicial Court.

And on the ninth day of said August, copies delivered to Defendant for entry in Supreme Judicial Court.

And on the sixth day of March, 1935, Rescript received from the Supreme Judicial Court, the same being in the words following, to wit:—

ORDERED, that the Clerk of said Court in said County make the following entry under said case in the docket of said Court; viz.:—

Order dismissing report affirmed.

By the Court,
WALTER F. FREDERICK, *Clerk.*

MARCH 5, 1935.

And on the eleventh day of said March, Defendant's motion for stay of execution filed, the same being in the words following, to wit:—

"NOW COMES the Defendant in the above-entitled action and moves that the issuance of the execution therein be stayed pending the decision of a petition to the Supreme Court of the United States for a writ of certiorari to review the judgment of this Court entered in this case.

By its Attorneys,
F. PAUL WELSCH.
EDWARD F. SMITH.

CERTIFICATE OF NOTICE.

I, Edward F. Smith, Attorney for the Defendant in the above-entitled action, do hereby certify in behalf of the above-named Defendant, that I this day notified the Plaintiff that I would on Monday, March 11, 1935 at 9:30 A. M. present the Defendant's Motion for Stay of Execution to the Court for allowance in the Fourth Session (Room 318) of the Municipal Court of the City of Boston. Said notice, containing a copy of the proposed motion, was mailed, postage prepaid, directed to Matthew Brown, Esq., One State Street, Boston, Mass. Dated at Boston, Mass., March 7, 1935.

EDWARD F. SMITH,
Attorney for Defendant.

Said motion heard and allowed upon the filing of a bond in the amount of $2,000.00 on or before March 15, 1935, at 10.00 A. M. Good, J.

COMMONWEALTH OF MASSACHUSETTS.

MUNICIPAL COURT OF THE CITY OF BOSTON,

SUFFOLK COUNTY.

MATTHEW BROWN, TRUSTEE,
METROPOLITAN BUILDERS' SUPPLY COMPANY,

v.

PALMER CLAY PRODUCTS COMPANY.

REPORT AS AMENDED.

This is an action of contract by the plaintiff, as trustee in bankruptcy, to recover from the defendant certain payments allegedly made by the bankrupt, Metropolitan Builders' Supply Company, to the defendant, which payments are alleged by the plaintiff to be preferences.

The answer is a general denial.

At the trial there were introduced in evidence by the plaintiff for the purpose of showing the financial condition of the Metropolitan Builders Supply Company certain balance sheets, marked Exhibits III and IV at the trial, which balance sheets were prepared by a certified public accountant from figures taken from the books of said company, copies of said balance sheets being hereto attached and made a part of this draft report.

At the trial there was evidence for the plaintiff on the part of Joseph Starr, President of the Metropolitan Builders Supply Company, that he had been selling construction materials for nine or ten years for several concerns and that he bought and sold the building materials for the Metropolitan Builders Supply Company; that in his opinion the fair value of the merchandise inventory as of November 1, 1932 on the balance sheet marked Exhibit IV was only Four Thousand Five Hundred Dollars ($4,500.00) instead of Six Thousand Nine Hundred Eighty-Six Dollars and Thirty-Two Cents ($6,986.32) and that the accounts receivable as of the same date in his opinion were worth

only Four Thousand Dollars ($4,000.00) instead of Four Thousand Eight Hundred One Dollars and Seventy-Three Cents ($4,801.73); that in his opinion the fair value of the merchandise inventory as of December 1st, 1932 as shown on the balance sheet marked Exhibit III was worth only Twenty-Eight Hundred Dollars ($2,800.00) instead of Four Thousand Seven Hundred Thirty-Five Dollars and Fifty-Seven Cents ($4,735.57) and that the fair value of the accounts receivable as of the same date was only Four Thousand Five Hundred Dollars ($4,500.00) instead of Seven Thousand Eight Hundred Eighty-Eight Dollars and Sixteen Cents ($7,888.16); that as of January 14th, 1933, in his opinion, the fair value of the merchandise on hand would be One Thousand Dollars ($1,000.00) and the fair value of the accounts receivable Two Thousand Dollars ($2,000.00); that as of January 15th, 1933 the Metropolitan Builders Supply Company owed in current liabilities Fourteen Thousand Nine Hundred Dollars ($14,900.00).

At the trial there was evidence for the plaintiff on the part of said Joseph Starr that he first discussed the question of credit with Claude A. Palmer and Charles A. Palmer of the defendant company in August of 1932; that thereafter, on September 6th or 8th, 1932 he had a conference with both Palmers and that Claude A. Palmer refused to give the Metropolitan Builders Supply Company any credit until Starr secured a guarantee from Louis B. Cadario & Sons; that he thereupon secured the guarantee of Louis B. Cadario & Sons, (a copy of which guarantee is hereto attached) and brought it to the defendant and that the defendant then shipped the Metropolitan Builders Supply Company a bill of goods; that he asked for merchandise shortly after November 8th, 1932 and was told by Charles A. Palmer that the Metropolitan Builders Supply Company could not have any more merchandise until the back bills were paid up and that he then told Charles A. Palmer that the Metropolitan Builders Supply Company was unable at that time to meet the obligation but that it had plenty of accounts receivable and that it expected more money from the Cadarios; that he had never told the defendant that the Metropolitan Builders Supply Company had Ten Thousand

Dollars ($10,000.00) in the bank; that he told the defendant that the Metropolitan Builders Supply Company had no cash at the time, but that it expected to get some good jobs and that it had the backing of Louis B. Cadario & Sons; that Helen M. Weldon, Treasurer of the company, made out a check for Seven Hundred Thirty-Five Dollars and Fifty-Eight Cents ($735.58) to the defendant; that he went to the defendant's office and saw Charles A. Palmer; that he told Palmer that he expected money in on Monday and to hold the check; that the defendant deposited the check several days later and that it came back from the bank unpaid.

There was evidence for the plaintiff on the part of said Helen M. Weldon that she kept the books of account of the Metropolitan Builders' Supply Company; that according to the books of account the payments shown to have been made under date of November 24, 1932, in the amounts of One Hundred Forty-Three Dollars and Sixty-Four Cents ($143.64) and Four Dollars and Seventy-Nine Cents ($4.79) were made to the railroad company in payment of freight charges on merchandise shipped to the Metropolitan Builders Supply Company by the defendant; that the Metropolitan Builders Supply Company never received the sum of One Thousand Dollars ($1,000.00) on August 16, 1932 or the sum of Fifteen Hundred Dollars ($1,500.00) on September 7th, 1932, which sums were listed in the books of the Metropolitan Builders Supply Company as having been received from Louis B. Cadario & Sons; that the books did not show the actual worth of any of the assets of the Company as of November 1st, 1932 or any other date.

There was evidence for the defendant on the part of the said Charles A. Palmer that Joseph Starr told him when he first approached him (Palmer) for credit that he had formed a new company and that he had the backing of Louis B. Cadario & Sons; that the company was starting with Ten thousand dollars ($10,000.00) in cash and that Starr throughout their business transactions "constantly built up the Metropolitan Builders Supply Company's credit" with him; that the books of account of the defendant company were kept under his supervision; that accord-

ing to said books of account the following payments were the only payments received by the defendant on the Metropolitan Builders Supply Company account:

October 15, 1932	$390.92
December 6, 1932	400.00
December 14, 1932	654.91
January 3, 1933	400.00

that according to the defendant's books of account the defendant between the dates of October 17, 1932 and November 8, 1932 shipped to the Metropolitan Builders Supply Company merchandise in the amount of Fourteen hundred dollars ($1,400.00) after the Three hundred ninety dollars and ninety-two cents ($390.92) payment had been received by the defendant on October 15, 1932, from the Metropolitan Builders Supply Company.

The said Charles A. Palmer, called as a witness for the plaintiff, testified that on or about the sixth day of September, 1932 Starr came to the defendant's office and talked with him; that Starr told him he had formed the Metropolitan Builders Supply Company and wanted to purchase merchandise from the defendant on credit; that he told Starr that this was a new company and that he would have to have the figures of this corporation; that Claude A. Palmer joined them and asked Starr about the assets of the company and Starr hedged; that Starr then said, "Will it be satisfactory if I give you a guarantee of L. B. Cadario & Sons?" and that Claude A. Palmer then said "O. K."; that on September 8th Starr came in and gave him the guarantee and they accepted the orders; that he told Starr they wanted their money on fifteen day terms; that they received a check on October 15th; that between September 9th and October 8th, 1932 the defendant shipped the Metropolitan Builders Supply Company merchandise amounting to One Thousand and Eight Dollars ($1,008.00); that it was about forty days after the first shipment that they got their first payment; that during that time they had sent numerous letters and made 'phone calls demanding payment of their money; that between October 15th and November 8th they received no further moneys; that on or about November 28th Starr gave them a check of the Metropolitan Builders Supply Company for

Seven Hundred Thirty-Five Dollars and Fifty-Eight Cents ($735.58); that the defendant deposited the check several days later, but that it came back from the bank unpaid on or about December 5th or 6th; that he insisted on getting some money and took the matter up with the guarantors and got a check for Four Hundred Dollars ($400.00) from Louis B. Cadario & Sons; that he got Six Hundred Fifty-Four Dollars and Ninety-One Cents ($654.91) on December 14th; that the last payment received by the defendant was on January 3rd; that he sold no further goods to the Metropolitan Builders Supply Company after November 8th; that Mr. Starr gave him the "usual debtor's stall" whenever he asked for money; that the bills to the Metropolitan Builders Supply Company included freight and merchandise, as this was their method of billing; that the check for Seven Hundred Thirty-Five Dollars and Fifty-Eight Cents ($735.58) from Starr came back; that he demanded payment right along from Starr persistently; that Starr gave him hard luck stories about collections being slow.

F. Paul Welsch, Esq., called as a witness for the plaintiff, testified that he was an attorney at law; that he was employed by the defendant on this account on or about November 15th; that on that date he had 'phoned the Metropolitan Builders Supply Company demanding payment and on the same date confirmed the telephone conversation with a letter; that on the 18th he sent a regular "form letter" which stated, in substance, that if payment was not received he would institute legal proceedings; that on November 29th he was told by the defendant to close the account; that he never received any money from the Metropolitan Builders Supply Company.

There was evidence for the defendant on the part of John Cadario that he was a member of the firm of Louis B. Cadario & Sons; that some time in September, 1932, he had a talk with the defendant about giving it a guarantee; that a guarantee went out of his office signed by him and that he has it back; that some money was sent to the defendant; that he may have sent the defendant between Three hundred dollars ($300.00) and Five hundred dollars ($500.00), but that he wasn't sure and that it might have

been more or less.

There was evidence for the plaintiff on the part of Arthur Burns, Chief Clerk of the Sheriff's Office of the County of Suffolk, that a keeper was placed on the premises of the Metropolitan Builders Supply Company on the 15th of December, 1932, and remained there through the 17th; that a second keeper was placed on the premises on the 16th, who remained through the 17th; that on December 21st a third keeper was placed on the premises of the company and that this keeper remained on the premises through January 31st; that attachments of the bank account of the Metropolitan Builders Supply Company in the Broadway National Bank in Chelsea were made on November 12th and at divers other times.

There was evidence for the defendant on the part of Claude A. Palmer and Charles A. Palmer that at no time was it ever called to their attention that there were keepers on the premises of the Metropolitan Builders Supply Company or that there were attachments on this company's bank account.

At the trial the defendant introduced in evidence the books of the Metropolitan Builders Supply Company which showed the following payments on the account of the Palmer Clay Products Company after November 1st, 1932:

November	5th, 1932	$143.64
	25th, 1932	143.64
	25th, 1932	4.79
December	5th, 1932	400.00
	6th, 1932	425.94
	13th, 1932	654.91
	29th, 1932	459.01

At the close of the trial and before the final arguments the defendant made certain requests for rulings, a copy of which is herewith annexed and made a part of this draft report.

The Court did not act on request #5 and denied requests numbered 8 and 11. In passing upon request #8 the Court said:

"Not a correct statement of the law. . . . Preference is determined as of the date of filing the petition."

The Court found the following facts:

"I find that on November 8, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders Supply Company was insolvent and, 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class. I find that the payments made by the guarantors on December 6, 1932, and December 14, 1932, were not preferential payments."

Some time after the trial, to wit, on January 11, 1934, the Court allowed a motion by the plaintiff to reopen the case for the submission of further evidence. At the hearing of said further evidence, the plaintiff, through the Cashier of the bank on whom the check was drawn, offered in evidence a certified check for Six hundred fifty-four dollars and ninety-one cents ($654.91) signed by the Treasurer of the Metropolitan Builders Supply Company and payable to the defendant. On the back of the check was stamped the name of the defendant. The Cashier testified that it was the custom of the bank to retain in its possession certified checks which had been paid by it; that the check in question, according to the records of the bank, had been paid.

The trial judge, subject to the objection of the defendant, admitted said check in evidence, saving the defendant's rights.

The Court thereupon revoked the general finding heretofore made and increased the finding of the plaintiff by the addition of said check to One thousand six hundred eighty-eight dollars and twenty-nine cents ($1,688.29).

A copy of the memorandum prepared and signed by the Court is hereto annexed and made a part of this draft report.

This report contains all the evidence material to the

questions reported.

The defendant claiming to be aggrieved by the rulings and refusals to rule as requested, I hereby report the same to the Appellate Division for determination.

[Matthew Brown testified that an involuntary petition in bankruptcy was filed on January 14th, 1933 against the Metropolitan Builders Supply Company. It was agreed between counsel for the defendant and the plaintiff that the said Matthew Brown was duly elected Trustee in Bankruptcy of the said Metropolitan Builders Supply Company on the 28th day of February, 1933, and duly qualified.

[There was offered in evidence and accepted by the Court without exception by the defendant as secondary evidence a check stub of the Metropolitan Builders Supply Company drawn on the Broadway National Bank of Chelsea, dated December 13th, 1933, in the sum of $654.91 payable to the Palmer Clay Products Co.]*

THOMAS H. DOWD,
Asso. Justice.

Filed and allowed (Dowd, J.) March 24, 1934.

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*Added by amendment filed and allowed April 5, 1934.

EXHIBIT III

METROPOLITAN BUILDERS SUPPLY COMPANY BALANCE SHEET AS OF DECEMBER ONE, NINETEEN HUNDRED THIRTY-TWO.

Assets

Current:		
Cash on Hand	22.27	
Accounts Receivable	7888.16	
Merchandise Inventory	4735.57	
Total Current Assets		12646.00
Fixed Assets:		
Building	7173.01	
Furniture & Fixtures	210.88	
Total Fixed Assets		7383.89
Other Assets:—		
Insurance Premiums Unexpired		105.00
Total Assets		20134.89

Liabilities

Current:		
Accounts Payable	13276.80	
Cash Overdraft	71.21	
Loans Payable (Umansky)	300.00	
Total Current Liabilities		13648.01
Capital:		
Capital Stock	9082.53	
Surplus (Deficit)	2595.65	
Total Capital		6486 88
Total Liabilities and Capital		$20134.89

EXHIBIT IV

METROPOLITAN BUILDERS SUPPLY COMPANY BALANCE SHEET AS OF NOVEMBER ONE, NINETEEN HUNDRED THIRTY-TWO.

Assets

Current:		
Cash on Hand	52.79	
Accounts Receivable	4801.73	
Merchandise Inventory	6986.32	
Total Current Assets		11840.84
Fixed Assets:		
Building (Cost)	6800.00	
Furniture & Fixtures	208.75	
Total Fixed Assets		7008.75
Other Assets:—		
Insurance Premiums Unexpired		85.93
Total Assets		18935.52

Liabilities

Current:		
Accounts Payable	10713.57	
Cash Overdraft	370.64	
Loans Payable (Umansky)	300.00	
Accrued Expenses	82.00	
Total Current Liabilities		11466.21
Capital:		
Capital Stock	9028.53	
Surplus (Deficit)	1613.22	
Total Capital		7469.31
Total Liabilities and Capital		18935.52

LOUIS B. CADARIO & SONS
Contractors and Builders
Metropolitan Building
260 Tremont Street
Boston, Mass.

September 7, 1932.

PALMER CLAY PRODUCTS COMPANY
139 Washington Street
Somerville, Massachusetts

Gentlemen:

We, hereby, unconditionally guarantee any or all bills contracted by the Metropolitan Builders' Supply Company for the purchase of materials from you until further notice.

In view of the fact that it might hurt the credit standard of the Metropolitan Builders' Supply Company, which we assure you can obtain these materials without any such guarantee, we ask that the contents of this letter be kept in strict confidence. Any violation of this last sentence may result in the withdrawal of this guarantee and a subsequent loss thereby of future business for your company.

The writer thinks this sounds a little abrupt, but he hopes that you will see the seriousness of such a precedence being established.

Very truly yours,

LOUIS B. CADARIO & SONS
By: John A. Cadario (signed)
John A. Cadario

JAC:MW

DEFENDANT'S REQUEST FOR RULINGS.

Now comes the defendant in the above-entitled cause and requests that the following rulings be made:

1. That there is a presumption that the payments received in this case by the defendant are legal.

Gilbert's Collier on Bankruptcy, page 919.

2. The burden of proof is on the plaintiff, as trustee in bankruptcy, in seeking to recover the payments received

by the defendant to overcome the presumption that the payments are legal and to establish the essential elements of a voidable preference by a fair preponderance of the evidence.

3. If the evidence offered by the plaintiff merely goes so far as to show that there was nonpayment of the debt on demand by the defendant and circumstances sufficient to create a suspicion or fear of insolvency then such evidence is insufficient, as matter of law, to charge the defendant with notice so as to make a payment subsequently made before bankruptcy recoverable as a preference, and the Court must therefore find for the defendant.

Arthur v. *Harrington,* 211 Fed. 215.

4. In order to establish a finding for the plaintiff the Court must be satisfied that the plaintiff has sustained the burden of proving by a fair preponderance of the evidence:

(a) That a "transfer" of the property of the debtor has taken place.

(b) That the debtor at the time of the "transfer" was insolvent.

(c) That the transfer was made within four months before the filing of the petition in bankruptcy or after the filing and before the adjudication.

(d) The transfer must enable the creditor to obtain a greater percentage of his debt than any other creditors of the same class.

(e) The person receiving it must have had reasonable cause to believe that the enforcement of the transfer would effect a preference.

5. If the Court finds that the Metropolitan Builders Supply Co., through its President, Joseph H. Starr, concealed the true situation of the bankrupt corporation from the defendant, then the payments cannot be set aside as preferential and the Court should therefore find for the defendant.

Brown v. *Guichard,* 7 Am. Bankr. 515.

6. The plaintiff, as trustee in bankruptcy, must prove by a fair preponderance of the evidence that the Metropolitan Builders Supply Co. was, at the time of each

alleged preferential payment, insolvent and proof that it was in failing circumstances and unable to meet its debts is insufficient.

Remington on Bankruptcy, sec. 2290.

7. Ground for reasonable belief in the present inability of a debtor to pay his debts in the course of business are not necessarily grounds for believing that he is insolvent.

In re Pettingell, 135 Fed. 218, 14 Am. Bankr. 728.

8. The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received.

9. The mere fact that the Metropolitan Builders Supply Co. was unable to meet its obligations as they matured was not alone sufficient to cause the defendant to believe or have reasonable cause to believe that the defendant was insolvent.

10. The interpretation of the term "insolvency" which the Court must follow in determining whether the payments in question are recoverable as preferences is that set forth in Sec. 1, Subdiv. 15 of the U. S. Bankr. Act.

11. The defendant having shipped, subsequent to the October 15th payment, of $390.92, merchandise in an amount in excess of such payment, the assets of the Metropolitan Builders Supply Co. were not thereby depleted, and it follows therefore that, as matter of law, such payment is not preferential and cannot be recovered.

U. S. Bankr. Act, Sec. 60c.

Collier on Bankruptcy, page 924 (note 367).

9 A.B.R. 773.

11 A.B.R. 596.

12. That if a creditor has been preferred, and afterwards in good faith gives the debtor further credit without security of any kind for property which becomes a part of the debtor's estate, the amount of such credit remaining

unpaid at the time of the adjudication in bankruptcy may be set off against the amount which would otherwise be recoverable from him.

U. S. Bankr. Act, Sec. 60c

13. That Louis B. Cadario & Sons on September 7, 1932, guaranteed all bills contracted by the Metropolitan Builders Supply Co. with the defendant.

14. That the payments to the defendant of $400. on December 6, 1932 and $654.91 on December 14, 1932, by checks of Louis B. Cadario & Sons, guarantors of the account, are not, as matter of law, preferential payments within the meaning of the Bankruptcy Act, and cannot be recovered by the plaintiff.

Mason v. *Little Falls, etc. Bank,* 17 Fed. 529,

Affirmed 225 U. S. 178.

Catchings v. *Chatham Nat. Bank,* 180 Fed. 103.

Dressel, et al v. *North State Co.,* 119 Fed. 531.

15. That to constitute a preferential transfer within the meaning of the Bankruptcy Act there must be a parting of the bankrupt's property for the benefit of the creditor and a consequent diminution of the bankrupt estate.

Dressel, et al v. *North State Co.,* supra.

16. That a payment received by a creditor of a bankrupt from a third party, and which did not come out of the assets of the bankrupt, does not constitute a preference.

Dressel, et al v. *North State Co.,* supra.

By its Attorney,

MEMORANDUM.

After notice and hearing on the plaintiff's motion to reopen the case for the submission of further evidence, at which hearing both parties were represented, the Court granted said motion. After hearing said further evidence, the Court being of the opinion that the finding now entered

does not conform to the facts which really existed, but were not presented at the original hearing, through no fault of the plaintiff, and in order to correct the record to make it conform with the facts, the Court now revokes the general finding entered. The Court further amends the finding of facts now filed by striking out the words and figures in said finding, to wit, "and December 14, 1932", the remainder of the finding to stand. The requests for rulings made by the defendant stand as disposed of, except request fourteen, which is not granted in so far as it refers to a certain check in the amount of $654.91 therein mentioned, for the reason that the Court finds that that check was paid, not by the guarantors, but by the bankrupt. A finding for the plaintiff is to be entered in the sum of $1,688.29, with interest from date of the writ.

THOMAS H. DOWD,
Associate Justice.

PLAINTIFF'S DECLARATION AS AMENDED.

And the plaintiff says that on or about the 14th day of January, 1933, there was filed against the Metropolitan Builders Supply Company, a Massachusetts corporation having an usual place of business in the City of Chelsea, in the United States District Court for the District of Massachusetts, an involuntary petition in bankruptcy as appears by case No. 52598 and that on the 27th day of January, 1933, the said corporation was duly adjudged a Bankrupt, and that on the 28th day of February, 1933, the plaintiff Matthew Brown was duly elected Trustee in Bankruptcy of the above Estate and duly qualified.

And the plaintiff further says that within four months preceding the filing of the aforesaid petition in bankruptcy, the Metropolitan Builders Supply Company was insolvent and indebted to the defendant on or about the 8th day of November, 1932, in the sum of $2,231.93.

That the aforesaid Metropolitan Builders Supply Company transferred by way of payment to the defendant about [$2,921.55]* in the sums and on the dates set forth

---

*Amendment filed and allowed November 16, 1933.

in the account hereto annexed marked "A"; that no merchandise was delivered or credit extended by the defendant to the said Metropolitan Builders Supply Company subsequent to the 8th day of November, 1932; that said payments were made to the defendant while the said Metropolitan Builders Supply Company was insolvent and within four months of the filing of the petition in bankruptcy; that the defendant had reasonable cause to believe that the said payments would effect a preference; that if the defendant is allowed to obtain said payments it will obtain a larger percentage of its debt than any other creditor of the same class.

Wherefore the plaintiff says that the defendant owes it the sum of [$2,921.55],* plus interest.

By his Attorney,
HARRY HOFFMAN.

Filed June 10, 1933.

"A"

PALMER CLAY PRODUCTS CO.

to

MATTHEW BROWN, Trustee, Dr.

1932		
Nov. 5	— Cash	$143.64
" 25	— "	143.64
" 25	— "	4.79
Dec. 5	— "	400.00
" 6	— "	425.94
" 13	— "	654.91
" 29	— "	459.01
	Total —	[$2921.55]*
[Oct. 7, 1933	— Cash	$418.66]*
[" 25, "	"	129.93]*
[" 27, "	"	141 03]*

*Amendment filed and allowed November 16, 1933.

DEFENDANT'S ANSWER.

And now comes the defendant in the above-entitled action and for answer denies each and every claim, item, allegation and particular in the plaintiff's writ and declaration contained.

By its Attorney,
F. PAUL WELSCH.

Filed June 13, 1933.

FINAL ORDER OF APPELLATE DIVISION.

ORDERED, that the Clerk make the following entry under said case in the docket, viz.:—

Report dismissed.

By the Court,
WILLIAM F. DONOVAN,
Clerk

May 16, 1934.

DEFENDANT'S APPEAL.

Defendant appeals from the final decision of the Appellate Division dismissing the report to the Supreme Judicial Court.

By its Attorney,
F. PAUL WELSCH.

Filed May 18, 1934.

Copy.

Attest, *Clerk.*

IT IS THEREFORE considered by said Court that he, the said Plaintiff, recover against the said Defendant the sum of Eighteen Hundred Six Dollars and Twenty-Five Cents, damage, and costs of suit, taxed at Thirty-Six Dollars and Seventy-Five Cents.

Judgment date, March 15, 1935.

Damages,	$1806.25
Costs,	36.75
	$1843.00

WILLIAM F. DONOVAN,
Clerk.

Attest:

OPINION OF SUPREME JUDICIAL COURT OF MASSACHUSETTS.

CROSBY, J. This is an action of contract brought by a trustee in bankruptcy to recover from the defendant certain payments alleged to have been made by the bankrupt Metropolitan Builders Supply Company to the defendant, which payments are alleged by the plaintiff to be preferences. The answer was a general denial.

It appeared that on January 14, 1933, an involuntary petition in bankruptcy was filed against the Metropolitan Building Supply Company and Matthew Brown was duly elected trustee in bankruptcy of the company on February 28, 1933, and duly qualified. At the close of the trial, the defendant made certain requests for rulings. The judge denied request numbered 8 which was as follows: "The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received." In passing upon this request he said: "Not a correct statement of the law. . . . Preference is determined as of the date of filing the petition." The judge found that "on November 8, 1932, and thereafter, the defendant had reasonable cause (1) to believe that the Metropolitan Builders Supply Company was insolvent and (2) that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class . . ." He found for the plaintiff in the sum of $1,688.29, with interest from the date of the writ. The case was reported to the Appellate Division. The report was dismissed, and the defendant appealed.

The only question argued by the defendant before this court is as to the time when a preference is to be determined. It is the contention of the defendant (1) that whether a payment operates as a preference is to be determined at the time it is made, or not at all; and (2) that whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of

its debt than other creditors of the same class is to be determined as of actual payment or transfer. The question presented involves the construction of § 60 a, b, of the bankruptcy act (Act of July 1, 1898, c. 541; 30 U. S. Sts. at Large, 544, 562, as amended by Act of February 5, 1903, 32 U. S. Sts. at Large, 799, c. 487, § 13, and by Act of June 25, 1910, 36 U. S. Sts. at Large, 842, c. 412, § 11). The defendant relies upon certain Federal cases which support its contentions. See *W. S. Peck & Co.* v. *Whitmer*, 231 Fed. Rep. 893; *Haas* v. *Sachs*, 68 Fed. Rep. (2d) 623. The construction of § 60, a, b, in these cases is directly contrary to that given by this court to the same section in *Rubenstein* v. *Lottow*, 223 Mass. 227. No decision of the Supreme Court of the United States interpreting this section in the present particular has been cited and none has been found. The case of *Rubenstein* v. *Lottow* is controlling. No occasion is presented for overruling it. *Old Dominion Copper Mining & Smelting Co.* v. *Bigelow*, 203 Mass. 159, 196. It has been referred to with apparent approval in *Cohen* v. *Goldman*, 250 Fed. Rep. 599, 601. It was likewise cited in a recent decision of this court discussing § 60 a of the bankruptcy act. *Baker* v. *Chisholm*, 268 Mass. 1, 7. In the absence of a contrary decision by the Supreme Court of the United States it must be accepted as sound and determinative of the present case. *County of Berkshire* v. *Cande*, 222 Mass. 87, 89. *Morse* v. *Stober*, 233 Mass. 223, 227. Unless and until the Supreme Court of the United States reaches a contrary conclusion, State courts are not precluded from exercising their own judgments upon questions involving Federal statutes. They are not concluded by decisions of other Federal courts. *Gehlan* v. *Patterson*, 83 N. H. 328, 330. *Noble* v. *Dibble*, 119 Wash. 509, 511. *Burnham* v. *Fort Dodge Grocery Co.*, 144 Iowa 577, 580. *Nebraska State Bank* v. *Citizens State Bank*, 122 Neb. 522, 526. However respectful consideration should be given to decisions of Federal circuit courts of appeal. The cases cited by the defendant have been examined. We realize that uniformity in the interpretation of the bankruptcy act is desirable. Nevertheless we are of opinion that the case

of *Rubenstein* v. *Lottow, supra,* should not be overruled. The construction of § 60 a, b, of the act adopted by the Appellate Division in this case was warranted.

It follows that there was no error in the denial of the defendant's eighth request.

Order dismissing report affirmed.

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1935.

The petition herein for a writ of certiorari to the Municipal Court of the City of Boston, County of Suffolk, Commonwealth of Massachusetts, is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office Supreme Court, U.
FILED
JUN 13 1935
CHARLES ELMORE CROP
CLERK

FILE COPY

Supreme Court of the United States.

October Term, 1935.

No. 125

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, Trustee,
RESPONDENT.

Petition for Writ of Certiorari and Brief in Support of Petition.

FRANK H. PARDEE,
Attorney for Petitioner.

F. PAUL WELSCH,
EDWARD F. SMITH,
Of Counsel for Petitioner.

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AUTHORITIES CITED IN BRIEF.

Gilbert's Collier on Bankruptcy (3rd. Ed.) pp. 559, 560 — 7

Gilbert's Collier on Bankruptcy (2d. Ed.) p. 94 — 11

Remington on Bankruptcy (3rd. Ed.) Sec. 1807 — 14

Supreme Court of the United States.

OCTOBER TERM, 1935.

No.

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, TRUSTEE,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO ISSUE TO THE MUNICIPAL COURT OF THE CITY OF BOSTON, COUNTY OF SUFFOLK, STATE OF MASSACHUSETTS.

To the Honorable the Chief Justice of the Supreme Court of the United States and the Honorable Associate Judges thereof:

The petitioner, Palmer Clay Products Company, respectfully represents to this Honorable Court as follows:

1. On January 14, 1933, an involuntary petition in bankruptcy was filed against the Metropolitan Builders Supply Company, and Matthew Brown, the respondent herein, was duly elected trustee in bankruptcy of said company on February 28, 1933, and duly qualified.

2. A suit was brought in the State Court by the respondent to recover from the petitioner certain payments alleged to have been made by the bankrupt, Metropolitan Builders Supply Company, to the petitioner, which payments were alleged by the respondent to be preferences. The answer was a general denial.

3. At the trial of said suit it appeared that the petitioner was a secured creditor, having in its possession a written guarantee of a third party. There was no evidence introduced as to whether there were other secured creditors, nor as to what percentage of their claims could be paid to all creditors of the petitioner's class on the dates when the various payments were made. The payments hereinabove referred to were made as follows: November 25, 1932, $143.64, $4.79; December 6, 1932, $425.94; December 13, 1932, $654.91; December 29, 1932, $459.01. No evidence was introduced as to what the bankrupt could have paid to all creditors of the petitioner's class at the time of each payment, nor as to what dividends were paid to creditors generally. These facts, your petitioner feels, constitute all of the facts necessary for the determination of the questions raised.

4. At the close of the trial of said case, the petitioner filed certain requests for rulings of law. The trial judge denied request numbered 8, which was predicated upon the law as laid down by the United States District Courts for the Districts of Kansas and Arkansas, and by the United States Circuit Court of Appeals for the Eighth Circuit, (cases cited in supporting brief), and was as follows: "The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received."

5. The trial judge refused to follow the law as laid down by said United States Courts and found for the respondent in the sum of One Thousand Six Hundred Eighty-eight Dollars and twenty-nine cents ($1,688.29), with interest from the date of the writ. In passing upon said request for ruling of law, the trial judge said: "Not a correct statement of the law. . . . Preference is determined as of the date of filing the petition."

The case was reported to the Appellate Division. The report was dismissed, and the petitioner appealed to the Supreme Judicial Court of Massachusetts.

6. The Supreme Judicial Court of Massachusetts, upon the appeal of this case, also refused to follow the rule laid down by the United States District Courts and United States Circuit Court of Appeals, stating in part as follows:

> "The question presented involves the construction of §60 a, b, of the bankruptcy act (Act of July 1, 1898, c. 541; 30 U.S. Sts. at Large, 544, 562, as amended by Act of February 5, 1903, 32 U.S. Sts. at Large, 799, c. 487, §13, and by Act of June 25, 1910, 36 U.S. Sts. at Large, 842, c. 412, §11). The defendant relies upon certain Federal cases which support its contentions. See *W. S. Peck & Co.* v. *Whitmer,* 231 Fed. Rep. 893; *Haas* v. *Sachs,* 68 Fed. Rep. (2nd) 623. The construction of §60 a, b, in these cases is directly contrary to that given by this court to the same section in *Rubenstein* v. *Lottow,* 223 Mass. 227. No decision of the Supreme Court of the United States interpreting this section in the present particular has been cited and none has been found. The case of *Rubenstein* v. *Lottow* is controlling. No occasion has been presented for overruling it. . . . In the absence of a contrary decision by the Supreme Court of the United States, it must be accepted as sound and determinative of the present case. . . . Unless and until the Supreme Court of the United States reaches a contrary conclusion, State courts are not precluded from exercising their own judgments upon questions involving Federal Statutes. . . . However, respectful consideration should be given to decisions of Federal circuit courts of appeal. The cases cited by the defendant have been examined. We realize that uniformity in the interpretation of the bankruptcy act is desirable. Nevertheless we are of opinion that the case of *Rubenstein* v. *Lottow*,

supra, should not be overruled. The construction of §60 a, b, of the act adopted by the Appellate Division in this case was warranted."

7. The authority under which the jurisdiction of this Honorable Court is invoked is by virtue of the provision of §344 of the Judicial Code. Also, because the Supreme Court of the United States has jurisdiction to review, in its discretion, by certiorari, proceedings involving bankruptcy questions in the courts of the states, as, for instance, where a State court has erroneously interpreted a provision in the bankruptcy law. It is the contention of the petitioner in this case that the Massachusetts State Courts have erroneously interpreted a provision in the bankruptcy law. The law on this is more fully covered in the petitioner's supporting brief.

8. The questions involved in this case as stated by the Supreme Judicial Court of Massachusetts in its decision are: *first,* whether the preferential character of a transfer of property is to be determined as of the date of the actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy; *second,* what is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class: (a) what percentage creditors of the same class could have received at the date of the actual payment or transfer, or (b) what other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate.

9. The petitioner respectfully submits to this Honorable Court that its petition should be allowed for the following reasons:

(1) The questions involved in the case are questions of far-reaching importance to mercantile and business interests which have not been, but should be, settled conclusively by this Court.

(2) The said Massachusetts State Courts have decided an important question of federal law in a way directly in conflict with the weight of authority and the applicable decisions of this Court as to call for the exercise of this Court's power of supervision.

(3) The decision of said Massachusetts State Courts is in direct conflict with the decisions of the United States District Courts for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; in consequence it is desirable that the rule of law applicable be definitely and finally established by this Court.

Wherefore the petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal of this Honorable Court, directed to the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, commanding said Court to certify and send to this Court a full and complete transcript of the record of all of the proceedings in this cause, to the end that said cause may be reviewed and determined by this Court, as provided by law, and that it may have such other and further relief as to this Honorable Court may seem appropriate and in conformity with law.

FRANK H. PARDEE,
Attorney for Petitioner.

F. PAUL WELSCH,
EDWARD F. SMITH,
Of Counsel for Petitioner.

I hereby certify that I am counsel for the Petitioner herein, Palmer Clay Products Company; that in accordance with the request of said petitioner, the foregoing petition

has been prepared; and that the allegations contained in said petition are true to the best of my knowledge and belief; and that said petition is, in my opinion, well founded in law and in fact, and should be granted.

FRANK H. PARDEE.

COMMONWEALTH OF MASSACHUSETTS.

COUNTY OF SUFFOLK, ss. BOSTON, MASSACHUSETTS

Then personally appeared Frank H. Pardee of Boston, Massachusetts, and made oath that he prepared and signed the foregoing petition and that the same is prepared with the consent of and in accordance with the request of the petitioner named therein, and that the allegations contained in said petition are true to the best of his knowledge and belief.

Before me,

EDWARD F. SMITH,

Notary Public.

My commission expires April 18, 1941.

Supreme Court of the United States.

OCTOBER TERM, 1935.

No.

PALMER CLAY PRODUCTS COMPANY,
PETITIONER,

v.

MATTHEW BROWN, TRUSTEE,
RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI.

Statement of the Case.

The facts and proceedings in this case are shown in full in the record and described, we believe, in sufficient detail in the petition (Pet. pars. 1 to 6, incl.).

The controversy has reference to the correct interpretation of §60 a, b, of the United States Bankruptcy Act.

Jurisdiction.

The authority under which the jurisdiction of this Honorable Court is invoked is by virtue of the provision of §344 of the Judicial Code. Gilbert's Collier on Bankruptcy (3rd Ed.) states in substance at pp. 559, 560: The bankruptcy law contains no provisions regulating the review by the Supreme Court of the United States of decisions in bankruptcy matters of the courts of last resort in a state. But the right to such review, as given generally, applies

likewise to review of bankruptcy matters. *Van Huffel* v. *Harkelrode,* 284 U.S. 225. . . . The Supreme Court has jurisdiction to review in its discretion, by certiorari, decisions of the highest court of a State in proceedings involving bankruptcy questions in the courts of the State, as, for instance, where a state court has erroneously interpreted a provision in the bankruptcy law. *Hill* v. *Harding,* 107 U.S. 631; *Williams* v. *Heard,* 140 U.S. 529; *Eau Claire Nat'l. Bank* v. *Jackman,* 204 U.S. 522.

Statement of the Question at Issue.

The specific questions, therefore, which the petitioner respectfully submits for the decision of this Honorable Court, in the light of conflicting interpretations by a State court and United States District and Circuit Courts of Appeal of §60 a, b, of the United States Bankruptcy Act, may be stated as follows:

(1) Whether the preferential character of a transfer of property is to be determined as of the date of the actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy.

(2) What is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class:

(a) What percentage creditors of the same class could have received at the date of the actual payment or transfer, or

(b) What other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate.

(3) Whether or not the Massachusetts State Courts acted erroneously in refusing the petitioner's request for ruling of law, which was as follows:

"The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received."

The Grounds for the Petition for Certiorari.

The grounds upon which the petitioner appeals to this Honorable Court for a writ of certiorari to the said Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, are as stated in the petition, and are as follows:

SUMMARY OF ARGUMENT

I. The questions involved in this case are questions of far-reaching importance to mercantile and business interests which have not been, but should be, settled conclusively by this Court.

II. The Massachusetts State Courts have erroneously interpreted a provision in the United States Bankruptcy Act and have laid down a doctrine which is untenable and in conflict with the weight of authority and the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision.

III. The decision of said Massachusetts State Courts is in direct conflict with the decisions of the United States District Courts for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; in consequence it is desirable that the rule of law applicable be definitely and finally established by this Court.

Argument.

Point 1.

The questions involved in this case are questions of far-reaching importance to mercantile and business interests which have not been, but should be, settled conclusively by this Court.

First. The determination of the questions involved in this case affect the entire business and mercantile world. It is common knowledge that most businesses are conducted on a credit basis. Therefore, unless the principles of law involved in this case are definitely and finally established by this Court, business concerns will be left in utter confusion, not knowing whether appellate courts in their respective states will follow the interpretation of the bankruptcy section involved in this case in the manner determined by the United States District and Circuit Courts of Appeal, or by the Massachusetts State Courts. It is imperative that the future creditors of businesses, whether such businesses are operated by corporations or by individuals, who are in the eyes of the Bankruptcy Act prospective bankrupts, should know what their rights might be in situations similar to the one at hand.

Therefore, your petitioner respectfully submits to this Honorable Court that the questions involved are of great importance to mercantile and business interests, and they have not been, but should be, settled conclusively by this Court.

Point 2.

The Massachusetts State Courts have erroneously interpreted a provision in the United States Bankruptcy Act and have laid down a doctrine which is untenable and in conflict with the weight of authority and the applicable decisions of this Court, as to call for the exercise of this Court's power of supervision.

First. The Supreme Judicial Court of Massachusetts decided in *Rubenstein* v. *Lottow,* 223 Mass. 227, that the preferential character of a transfer of property is to be determined as of the date of the filing of the petition in bankruptcy, and in the instant case said Court refused to overrule its previous decision despite the fact that subsequent to *Rubenstein* v. *Lottow, supra,* the United States District Courts for the Districts of Kansas and Arkansas and the United States Circuit Court of Appeals for the Eighth Circuit rejected the interpretation in *Rubenstein* v. *Lottow* of §60 a, b, of the United States Bankruptcy Act, and decided in substance that the preferential character of a transfer of property "*is to be determined as of the date of the actual transfer, and not as of some future date, when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses.*" *W. S. Peck & Co.* v. *Whitmer,* (C.C.A. 8) 231 Fed. 893, 897; *Mansfield Lumber Co.* v. *Sternberg,* (C.C.A. 8) 38 Fed. (2d) 614, 617; *Haas* v. *Sachs,* (C.C.A. 8) 24 Am. B. R. (N.S.) 388.

Second. Gilbert's Collier on Bankruptcy (2d Ed.) at p. 94, in stating the weight of authority on the question involved in this case, said as follows: "*By the language of §60 a, b, of the Bankruptcy Act, a payment must operate as a preference at the time it is made, or not at all, and the belief of the creditor as to whether it will constitute a preference or not, must be of the time it is made.*"

As was said *In re Gaylord,* 225 Fed. 234 (U.S.D.C.N.Y.), at p. 238: " . . . So the intent of the person taking the security or receiving the transfer is immaterial, provided he *then* had reasonable cause to believe the taking and enforcement thereof would enable him to obtain a greater percentage of his debt than would other creditors of the same class *then existing.* . . ."

Point 3.

The decision of said Massachusetts State Courts is in direct conflict with the decisions of the United States District Courts for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; in consequence it is desirable that the rule of law applicable be definitely and finally established by this Court.

First. In the case of *W. S. Peck & Co.* v. *Whitmer,* (C. C.A. 8) 36 Am. B. R. 722, 231 Fed. 893, we find a United States Circuit of Appeals deciding the federal question involved in this case squarely against the decision in *Rubenstein* v. *Lottow,* 223 Mass. 227. In that case, the United States Circuit Court of Appeals, speaking through Garland, Cir. J., said at page 897:

> "Let us assume that the record shows that the bankrupt was insolvent at the time the several payments were made, and that appellants had knowledge of such facts, which if investigated would have led to a knowledge of the insolvency, there would still remain to be established two important and material facts, viz., that the payments *at the time they were made to appellants enabled them to receive a larger percentage of their respective debts than any other creditor of the same class,* and that *at the time each particular payment was made* appellants had reasonable cause to believe that the payments would have this effect. We fail to find any evidence in the record that the appellants *at the time* they received the several payments had reasonable cause to believe that the enforcement thereof would effect a preference.
>
> " . . . In view of these undisputed facts, how can it be said that the appellants at the time they received the payments had *then* reasonable cause to believe that the enforcement of the transfer would effect a preference; that is, *that it would result then and there if the*

estate of the bankrupt was distributed, in the appellants receiving a larger percentage of their debt than other creditors of the same class?"

(At p. 898). . . . "The estate of the bankrupt at the time the payments were made, would have paid about 60 per cent on the dollar. The creditor who receives a partial payment on his debt, so far as the question of his having reasonable cause to believe that the enforcement of the payment would effect a preference is concerned, *has the right to look at the bankrupt's estate at the time the payment is made, bankruptcy may never occur; but if it does, the creditor may not be charged with a knowledge of what an estate will pay out after it has undergone the shrinking process of the court.*

"We are therefore of the opinion that the trustee did not sustain the burden of proof in establishing that *at the time the payments were made* they operated as preferences, and that *at the time they were made* the appellants had reasonable cause to believe that the enforcement of the payment would effect a preference."

And on the heels of *Peck & Co.* v. *Whitmer, supra,* followed *Haas* v. *Sachs,* 68 Fed. (2nd) 623. Here again the United States Circuit Court of Appeals for the Eighth Circuit, as late as December 28, 1933, citing with approval *Peck* v. *Whitmer, supra,* stated through Gardner, Cir. J. at p. 625:

"If enough assets remain after a transfer to one creditor to give other creditors in the same class as great or greater percentage of their claims, then no voidable preference results. *W. S. Peck & Co.* v. *Whitmer,* (C.C.A. 8) 231 F. 893, 897; *Mansfield Lumber Co.* v. *Sternberg,* (C.C.A. 8) 38 F. (2nd) 614, 617.

"This court has held that whether the effect of the transfer will be to enable the creditor receiving it to

obtain a greater percentage of his claim than other creditors of the same class, *is to be determined as of the date of the actual transfer, and not as of some future date when later events have altered the assets or liabilities, or when court liquidation may have caused shrinkage of values and other losses.* In considering this question, Judge Garland, speaking for this court in *W. S. Peck & Co.* v. *Whitmer, supra,* among other things, said:

'It is argued that the words "will be" refer to some future period, presumably to the time when after the payment of all expenses, a bankrupt's estate is ready for distribution by a court of bankruptcy. We are of the opinion, however, that by the very language of Section 60 b (11 U.S.C.A. Sec. 96 b) *the payment must operate as a preference at the time it is made, or not at all,* and the belief of the creditor as to whether it will constitute a preference or not, must be of the time the payment is made.

'Taking the record as it stands, how could the appellants be held to have believed that *if the estate of the bankrupt had been distributed at the time of these payments it would not have given every creditor a greater percentage of their debts than they were receiving.*'

"The doctrine of the *Peck* Case was reaffirmed by this court in an opinion by Judge Booth in *Mansfield Lumber Co.* v. *Sternberg, supra,* where it is said:

'It is manifest that, if all creditors of the same class were to receive the same percentage on their debts, there would be no preference. Remington on Bankruptcy (3d Ed.) Sec. 1807. *Or, if enough assets were left after a transfer to one creditor to give to other creditors in the same class an equal or greater percentage of their debts, there was no preference.*' "

Therefore, it is respectfully submitted that the conflict between the decisions of the Massachusetts State Courts and the United States District Courts for the Districts of Kansas and Arkansas and the United States Circuit Court of Appeals for the Eighth Circuit upon the identical questions of law is apparent; and the Supreme Court of the United States, never having had occasion to settle the question, should now settle it definitely and finally.

Conclusion.

It is most respectfully submitted to this Honorable Court that the questions involved in this case are of great importance in the administration of the Bankruptcy Act and of great importance to the mercantile and business interests; that there is conflict between the Massachusetts State Courts and the District Courts of the United States for the Districts of Kansas and Arkansas and the Circuit Court of Appeals for the Eighth Circuit; that the Massachusetts State Courts have erroneously interpreted a provision in the United States Bankruptcy Act, and have laid down a doctrine which is untenable, and in conflict with the weight of authority and the applicable decisions of this Court as to call for the exercise of this Court's power of supervision; that especially in view of the fact that the Massachusetts State Courts have by the substance of their decision openly invited a definite and final ruling on this question in their statement that "in the absence of a contrary decision by the Supreme Court of the United States it, (*Rubenstein* v. *Lottow*), must be accepted as sound and determinative of the present case. . . . Unless and until the Supreme Court of the United States reaches a contrary conclusion. . . .;" and for all other reasons above pointed out, it is respectfully submitted that the writ of certiorari

should issue; that the judgment of the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, should be reversed.

Respectfully submitted,

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Supreme Court of the United States.

October Term, 1935.

No. 125.

PALMER CLAY PRODUCTS COMPANY,
Petitioner,

v.

MATTHEW BROWN, Trustee in Bankruptcy of Metropolitan Builders Supply Company,
Respondent.

Brief for Respondent in Opposition to Petition for Writ of Certiorari.

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Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 125.

PALMER CLAY PRODUCTS COMPANY, *Petitioner*,

v.

MATTHEW BROWN, TRUSTEE IN BANKRUPTCY OF METROPOLITAN BUILDERS SUPPLY COMPANY, *Respondent*.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

Statement of the Case.

The facts involved in this petition for a writ of certiorari to the Municipal Court of the City of Boston, County of Suffolk, Commonwealth of Massachusetts, are set forth in the record, and may, we believe, be briefly stated as follows:

The petitioner, on or about November 8, 1932, was a creditor of the Metropolitan Builders Supply Company in the sum of $2088.29 for merchandise, all of which was sold by the petitioner to the Metropolitan Builders Supply Company at various times prior to that date, no merchandise having been sold by the petitioner subsequent to November 8th. (See Transcript of Record, page 11, line 10.) Between November 8, 1932, and January 3, 1933, the petitioner received in full payment of its balance due the sum of $2088.29, receiving $1688.29 from the Metropolitan Builders Supply Company and $400 on December 5, 1932, from the firm of Louis B. Cadario & Sons, a third party from whom

the petitioner had received a guarantee of the account at a prior date, the said guarantor having received no security or right to any of the assets of the said Metropolitan Builders Supply Company for the giving of said guarantee to the petitioner.

The trial justice of the Municipal Court of the City of Boston, after hearing the case, on December 15, 1933, found for the respondent, and made the following findings of fact:

> "I find that on November 8, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders Supply Company was insolvent, and 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class. I find that the payments made by the guarantors on December 6, 1932, and December 14, 1932, were not preferential payments." (See Transcript of Record, page 13. See also subsequent amendment of finding increasing amount—Transcript of Record, page 13.)

The trial justice denied request for ruling No. 8 of the petitioner, which was as follows:

> "The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received." (See Transcript of Record, page 19.)

Following the above finding, the petitioner requested the Appellate Division of the Municipal Court of the City of Boston to report the case to the Supreme Judicial Court of Massachusetts. The request for report was dismissed

by that court, after hearing, on May 16, 1934. (See Transcript of Record, page 5.) Thereupon, the petitioner filed his claim of appeal from this ruling to the Supreme Judicial Court of the Commonwealth of Massachusetts. That court, after hearing, sustained the ruling of the Appellate Division, and on the 6th day of March, 1935, rescript was received by the Municipal Court of the City of Boston from the Supreme Judicial Court in the following words, to wit:

> "ORDERED, that the Clerk of said Court in said County make the following entry under said case in the docket of said Court, viz:—
>
> Order dismissing report affirmed.
>
> By the Court,
>
> March 5, 1935. WALTER F. FREDERICK, Clerk."

(See Transcript of Record, bottom of page 5 and top of page 6.)

Statement of the Issues.

The sole question presented to the Supreme Judicial Court of Massachusetts by the petitioner on appeal was the correctness of the refusal of the trial justice to grant its request for ruling No. 8. It was the petitioner's contention that, while the Supreme Court of Massachusetts had decided this question adversely to it in accordance with its ruling in the case of *Rubenstein* v. *Lottow*, 223 Mass. 227, the refusal to grant this request was in conflict with the law as apparently set forth in certain Circuit Court of Appeals decisions of the Eighth Circuit. The petitioner now predicates his prayer to this court that a writ of certiorari issue to the Municipal Court of the City of Boston on the same ground, stating that the issues are as follows:

> "(1) Whether the preferential character of a transfer of property is to be determined as of the date of the

actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy.

"(2) What is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class.

"(a) What percentage creditors of the same class would have received at the date of the actual payment or transfer, or

"(b) What other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate.

"(3) Whether or not the Massachusetts State Courts acted erroneously in refusing the petitioner's request for ruling of law, which was as follows:—

" 'The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim that other creditors of the same class could at the time of each payment have received.' "

The pertinent sections of the Bankruptcy Act, Act of July 1, 1898, c. 541, 30 U.S. Sts. at Large, 544, 562, as amended by Act of February 5, 1903, 32 U.S. Sts. at Large, 799, c. 487, sec. 13, and by Act of June 25, 1910, 36 U.S. Sts. at Large, 842, c. 412, sec. 11, which are called in question are as follows:

"Sec. 60, Preferred Creditors.

"(a) A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication pro-

cured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required or permitted.

"(b) If a Bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Briefly stated, the respondent submits that the first issue before the court is a preliminary issue as to jurisdiction, as follows:

Was the petition for certiorari to the Municipal Court of the City of Boston, applied for in this court, filed by the petitioner within the three-months period as required by the Act of September 6, 1916, c. 448, 39 Stat. pp. 726, 727, and 728, which is as follows:

> "No writ of error, appeal, or writ of certiorari intended to bring up any cause for review by the Supreme Court shall be allowed or entertained unless duly applied for within three months after entry of judgment or decree complained of."

The remaining issues, on the merits, the respondent submits are as follows:

1. It is not open to the petitioner to argue to this court that the findings of the trial justice were not supported by the evidence.

2. The trial court's findings of fact as supported by the evidence appearing in the record before this court rendered the petitioner's request for ruling No. 8 immaterial, and therefore the ruling by the trial justice refusing to grant this request, even if it were an erroneous ruling, was not prejudicial to the petitioner, and gives him no right to a review of the question of law presented by this request for ruling.

3. The decision of the Supreme Judicial Court of Massachusetts in this case was in accordance with the spirit and purpose of the Bankruptcy Act, and is supported by decisions of this court and the weight of authority in the United States District Courts, Circuit Courts of Appeals, and the highest courts of the states.

4. The decision of the trial court being supported by the evidence, regardless of the ruling made by the trial court on request for ruling No. 8 of the petitioner, and the decision of the Supreme Judicial Court of Massachusetts having been a correct interpretation of the Bankruptcy

Act, sections 60*a* and 60*b* as sustained by the weight of authority, this court in the exercise of its discretion should refuse to take jurisdiction by certiorari.

Jurisdiction.

THE RESPONDENT SUBMITS THAT THE PETITIONER HAS FAILED TO APPLY FOR WRIT OF CERTIORARI WITHIN THE TIME GRANTED TO HIM BY THE ACT OF SEPTEMBER 6, 1916, CHAPTER 448.

It would appear clear that no petition for certiorari to this court can be applied for until the last step which can be taken in the inferior courts has been disposed of and the case finally determined in the court of last resort in the jurisdiction to which the petitioner is requesting certiorari to issue.

The respondent submits, however, that when such final proceeding has terminated, the three-months period within which certiorari must be applied for then commences, and that the date from which the three-months period is computed is the date of that final decision of the highest tribunal, and from no other date.

The course of the litigation in the state courts of Massachusetts in this case terminated by the refusal of the Supreme Judicial Court on March 5, 1935, to grant to the petitioner its appeal from the ruling of the Appellate Division of the Municipal Court of the City of Boston, County of Suffolk, State of Massachusetts, refusing its request for a report to the Supreme Judicial Court. This was a finding on the merits. On March 6, 1935, rescript was received from the Supreme Judicial Court in the following words:

> "ORDERED that the Clerk of said Court in said County make the following entry under said case in the docket of said Court, viz:—
>
> "Order dismissing report affirmed."

By this order, the highest tribunal of Massachusetts to which the petitioner had final right of appeal terminated the course of this litigation.

That the petitioner himself regarded this finding as the conclusion of the litigation is established by the fact that on the 7th day of March, 1935, the day following the entry of the order, the petitioner gave notice to the respondent of a motion to be argued before the Municipal Court of the City of Boston on the 11th of March, 1935, in which he moved "that the issuance of execution therein be stayed pending petition to the Supreme Court of the United States for writ of certiorari to review the judgment of this Court entered in this case." (See Transcript of Record, page 6.)

It will appear from the Transcript of the Record (see page 6) that the order of the Supreme Judicial Court denying the petitioner's appeal is the final entry in the docket of the Municipal Court of the City of Boston apart from the motion to stay execution and order entered thereon, although the petitioner in his brief refers to the date of "Final Judgment" as being March 15, 1935. Even assuming that such an entry appears on that date in the docket of the Municipal Court of the City of Boston and is not disclosed by the record, the respondent submits that this date has no bearing on the question as to when the three-months period within which a writ of certiorari must be applied for commences.

It would indeed be a curious Statute of Limitations which required for its commencement the doing of a clerical act which would be subject to the delay, negligence, illness, or any of the other numerous factors which enter into the mere clerical docketing of an order in the records of the trial court. It would, however, appear clear that the date on which the final order is made by the highest tribunal of the jurisdiction appealed from is of such definite character as to time

and of such finality as to character as to be the proper date to commence reckoning the three-months period.

This court seems to have so held in the case of *Andrews* v. *Virginian Railway Co.*, 248 U.S. 272. In that case the respondent argued that the period must commence from the date when judgment was originally issued by the trial court despite the fact that the petitioner had further courses open to it in the state courts to appeal from said judgment. This court decided that the period commenced upon the decision of the highest tribunal on appeal from the original judgment.

In this case the respondent is not contending that the three-months period should have commenced with the 13th day of January, 1934, on which date the Municipal Court of the City of Boston made its finding for the respondent in the sum of $1688.29, with interest. He does contend, however, that, in accordance with the ruling in the case of *Andrews* v. *Virginian Railway Co.* (see *supra*), the last appeal from this finding having terminated on March 6, 1935, the three-months period within which to apply for certiorari then commenced.

In *Citizens' Bank of Michigan City, Indiana,* v. *Opperman,* 249 U.S. 448, this court stated that, when a petition for rehearing is entertained in the state court, the judgment does not become final for the purpose of review to the United States Supreme Court until the petition has been denied, or otherwise disposed of, and the three-months period begins to run from that time.

Again in *Chicago Great Western Railroad Co.* v. *Basham, Administrator of Spellman,* 249 U.S. 164, the court said that the "Judicial Code permits review by this court only of the final judgment or decree of the highest court in which a decision in the suit could be had. It is only a judgment marking the conclusion of the course of litigation in the courts of the State that is subject to our review.

Hence, whatever its form of finality, if a judgment be in fact subject to reconsideration and review by the State Court of last resort through the medium of a petition for rehearing and such petition is presented to and considered by that Court we must take it that by the practice prevailing in the State, the litigation is not brought to a conclusion until this petition is disposed of and until then the judgment previously rendered cannot be raised as a final judgment within the meaning of the Act of Congress."

The respondent submits that the decisions of this court in the cases heretofore cited indicate that the finding of the trial justice of the Municipal Court of the City of Boston on the 13th day of January, 1934, became final on March 6, 1935, on which date the Supreme Judicial Court, the highest tribunal to which the petitioner could appeal from the trial court's finding, affirmed the decision of the Appellate Division dismissing the request for a report. The petitioner therefore submits that the three-months period within which application for certiorari could be made to this court commenced on March 6, 1935, and that this three-months period elapsed on June 6, 1935.

The record in this case will indicate that the petition and supporting brief were not filed by the petitioner with the Clerk of this Court until the 13th day of June, 1935, and that it is therefore late.

If it be true that the petition was filed late, then it cannot be entertained by this Honorable Court even if the record should indicate (although your respondent says that it does not) a proper case for allowance, and therefore this petition for certiorari should be denied.

Rust Land Co. v. *Jackson,* 250 U.S. 71, at 76.

Argument on the Merits.

I.

IT IS NOT OPEN TO THE PETITIONER TO ARGUE TO THIS COURT THAT THE FINDINGS OF THE TRIAL JUSTICE WERE NOT SUPPORTED BY THE EVIDENCE.

Apart from the jurisdictional objection to this petition for certiorari as heretofore set forth, the respondent submits that the only possible basis for a rehearing of this case by this court which can be urged by the petitioner must rest on the question of the correctness of the denial by the trial justice of its request for ruling No. 8, and that at this stage of the proceedings it cannot inject any argument in support of the petition for certiorari to the effect that the evidence submitted to the trial court did not support the findings made.

On page 2, paragraph 3, of the petition for certiorari and brief in support thereof filed by the petitioner the petitioner attempts to do this very thing and would argue at this date, for the first time, that it was a secured creditor having a guarantee from a third person, that no evidence was introduced as to what percentage of their claims could be paid to all creditors of the petitioner's class on the dates when the various payments were made, nor as to what dividends were paid to creditors generally.

It was open to the petitioner in the state court by a proper request for ruling or exception to the findings of fact to present these issues to an appellate court. Not having done so, it was not open to the petitioner, even in the state court, to take exceptions to the findings of fact of the trial justice.

Reid v. *Doherty*, 273 Mass. 388.
Richards v. *Appley*, 187 Mass. 521.

In the latter case the Supreme Court of Massachusetts stated: "If no ruling was asked for on the evidence, it is too late to except to a finding on the ground that it is not warranted by the evidence."

And it is clearly not open to the petitioner to argue in this court that the findings of fact in the trial court were not supported by the evidence.

In the case of *Eau Claire National Bank* v. *Jackman, Trustee in Bankruptcy,* 204 U.S. 522, suit was brought by a trustee in bankruptcy to recover a preference from the Eau Claire National Bank. The issues raised were almost on all fours with the ones here raised by the petitioner. The trial court found as a fact that certain transfers of property were made to the bank by the bankrupt; that it was the intention of the bankrupt to give a preference; that the bank when receiving the preferential payments had reasonable cause to believe that the bankrupt intended to give such a preference "to enable it to obtain a greater percentage of its indebtedness than any other of his [the bankrupt's] creditors of the same class would be enabled to obtain." The petitioner attempted in this court to raise, among other issues, the question as to what class of creditors the bank belonged and certain other questions of fact. This court refused to consider such assignments of error, stating:

> "On the merits of the case we start with the facts established against the bank that the property of Young [the bankrupt] at the time he executed the chattel mortgages and when he executed the deed to the lumber company, at a fair valuation, was insufficient to pay his debts and that by execution of these instruments and by the transfer of his property effected thereby, he intended to give the bank a preference over his other creditors, and that the bank had rea-

sonable cause to believe that he intended thereby to give it a preference and to enable it to obtain a greater percentage of its debt than any other creditors of Young of the same class. These then are the prominent facts and seemingly justified the judgment."

So here, the trial court having found as a fact that "on November 8th, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders Supply Company was insolvent, and 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class," every element necessary to establish a preference having been found as a fact, the judgment would seemingly be justified.

See *Dutcher* v. *Wright*, 94 U.S. 553, at 557.

Even if it is granted for the purposes of argument that it is still open to the petitioner to make the arguments set forth in its supporting brief on page 2, paragraph 3, it is clear that these arguments have no merit.

It has been decided in innumerable decisions in this court that with reference to bankruptcy distribution there are only two classes of creditors—

(1) Those entitled to be paid in full as priority creditors, and—

(2) Those creditors who are entitled to equal distribution after priority claims have been paid.

The courts have many times held that secured creditors and unsecured creditors both are within the second class of creditors and that no evidence need be introduced by a trustee in bankruptcy as to distributions which could be made to secured creditors as opposed to unsecured credi-

tors, since no such difference in distribution in bankruptcy exists.

Hassock v. *Varick Bank,* 206 U.S. 28.
Swartz v. *Fourth National Bank,* 117 Fed. 1 (C.C.A. 8th).
Livingston v. *Heineman,* 120 Fed. 786.
Gorman v. *Wright,* 136 Fed. 164.

And even if we assume as a matter of argument that a secured creditor is in a different class from an unsecured creditor with respect to the issues herein raised, it is clear that the petitioner in this case is not a secured creditor, for it has also been decided that a creditor whose claim is secured by one or more third persons is not a secured creditor and is in the same class as one who is not so secured. Chapter 1, section 1, sub-section 23, of the Bankruptcy Act states that a " 'secured creditor' shall include a creditor who *has security for his debt upon the property* of the bankrupt of a nature to be assignable under this act, or who owns such a debt for which some indorser, surety, or other persons secondarily liable for the bankrupt *has such security upon the bankrupt assets.*"

Swartz v. *Fourth National Bank of St. Louis,* 117 Fed. 1.
Livingston v. *Heineman,* 120 Fed. 786.
Gorman v. *Wright,* 136 Fed. 164.
In re H. V. Keep Shirt Co., 200 Fed. 80.

From the record of the case, no evidence appears to show that the petitioner has any security for his debt upon the property of the bankrupt or that the guarantor secondarily liable had any such security upon the bankrupt assets, so that the above rulings apply.

The argument of the petitioner that no evidence was submitted as to what dividends were paid to creditors

generally, your respondent submits, is not open at this time, as the court has found as a fact that it was preferred over other creditors of the same class, but for the purpose of argument your respondent says that the undisputed evidence of the president of the bankrupt corporation as to the assets and liabilities of the bankrupt corporation on January 14, 1933, the date of the filing of the involuntary petition, to the effect that the total assets were $3000 at market value and current liabilities $14,900, was sufficient to support any burden of proof resting on the respondent on this issue since it established what the possible distribution before deducting administration expenses would be.

II.

THE TRIAL COURT'S FINDINGS OF FACT AS SUPPORTED BY THE EVIDENCE APPEARING IN THE RECORD BEFORE THIS COURT RENDERED THE PETITIONER'S REQUEST FOR RULING No. 8 IMMATERIAL, AND THEREFORE THE RULING BY THE TRIAL JUSTICE REFUSING TO GRANT THIS REQUEST, EVEN IF IT WERE AN ERRONEOUS RULING, WAS NOT PREJUDICIAL TO THE PETITIONER, AND GIVES HIM NO RIGHT TO A REVIEW OF THE QUESTION OF LAW PRESENTED BY THIS REQUEST FOR RULING.

The record in this case (see page 12) indicates that the payments which were ordered returned by the petitioner to the respondent as preferential were all received by the petitioner between November 25, 1932, and January 3, 1933. (See Record, page 12.) The record also contains (see pages 15 and 16) two balance sheets of the Metropolitan Builders Supply Company as of December 1, 1932, and November 1, 1932. The uncontradicted evidence as to the fair market value of the assets on these dates indicates that on December 1, 1932, the current assets at a fair value amounted to $7335.57, and that the current liabilities were

$13,648. (See Balance Sheet, Record, page 15.) Even if we assume that the rule of law requested by the petitioner, to the effect that the respondent had the burden of proving that at the time of each payment the petitioner received more than other creditors of the same class could have received if the assets had at that time been distributed, is correct, it appears clear that the petitioner did receive such preferential treatment. At best, if the assets had been distributed on November 1, 1932, almost thirty days prior to the first payment to the petitioner in this case, the payment to creditors of the same class would not have been larger than approximately 74%. If the assets had been distributed as of December 1, 1932, the creditors of the same class as the petitioner would have received approximately 57% of their claims. If the assets had been distributed on or about January 14, 1933, the testimony appearing in the record on page 8 indicates that the creditors would have received approximately 20%. It appears clear that the assets of this company were shrinking with rapidity.

Since the record indicates that the payments were made to the petitioner between November 25 and January 3, 1933 (see Record, page 11, line 10, and also page 12), it would appear fair in arguing this case to use the average figure as shown by these balance sheets to have been the proportionate ratio of assets to liabilities on November 1, 1932, December 1, 1932, and January 14, 1933, as a basis for computation. This figure is approximately 50%. The payments were grouped so closely that over $1500 of the total $1688.96 was paid between November 25 and December 29, 1932.

So that, even if we assume that the trial justice should have granted request for ruling No. 8 even though it was directly in conflict with the decision of the Supreme Court of Massachusetts as laid down in the case of *Rubenstein* v.

Lottow, 223 Mass. 227, the finding in this case would have been the same. How, then, was the petitioner prejudiced by the failure to grant this request?

Certainly it would appear in accordance with all principles of justice and good sense to hold that the refusal by the court to grant a request for a ruling rendered immaterial by the court's findings of fact should not be ground for overturning a decision arrived at after a hearing and a mature consideration of all the facts. And the law appears to support such a conclusion.

Section 269 of the Judicial Code of the United States (Act of March 3, 1911, c. 231, 36 Stat. 1163, as amended February 26, 1919, c. 48, 40 Stat. 1181), declares: "On the hearing of any writ of error, civil or criminal, the court shall give judgment after an examination of the entire record before the court without regard to technical errors, defects or exceptions which do not effect the substantial rights of the parties."

The principle here enunciated is a statutory codification of the common-law rule commonly referred to as the "Rule of Substantial Justice."

This rule is enunciated in many cases and is based on the principle that, even though an error of law or procedure was committed in the conduct or disposition of a case, if substantial justice was done the parties and the error was immaterial or technical, the finding should be allowed to stand.

Eau Claire National Bank v. *Jackman,* 204 U.S. 522, 534, *et seq.*

Virginia R.R. & Power Co. v. *Smith & Hicks, Inc.,* 105 S.E. 532 (Va.)

Green v. *Ruffin,* 125 S.E. 742.

West v. *United States,* 258 Fed. 413.

Ashapa v. *Reed,* 280 Mass. 514, at 516.

Gigoux v. *Henderson*, 107 Kans. 325.
Queeney v. *Willis*, 225 N.Y. 374.
Stevens v. *Ross*, 1 Calif. 94, at 98.

The respondent respectfully submits that, since this court on certiorari need only exercise its jurisdiction to review when, in its discretion, the case merits review, substantial justice having been done the petitioner, the sound exercise of its discretion should result in its denying this petition.

III.

THE DECISION OF THE SUPREME JUDICIAL COURT OF MASSACHUSETTS IN THIS CASE WAS IN ACCORDANCE WITH THE SPIRIT AND PURPOSE OF THE BANKRUPTCY ACT, AND IS SUPPORTED BY DECISIONS OF THIS COURT AND THE WEIGHT OF AUTHORITY IN THE UNITED STATES DISTRICT COURTS, CIRCUIT COURTS OF APPEAL, AND THE HIGHEST COURTS OF THE STATES.

The elements necessary to establish a voidable preference under the Bankruptcy Act are (1) a transfer of the property of the debtor without present consideration, (2) insolvency at the time of the transfer, (3) the securing by the creditor of an excessive percentage of his debt in enforcing the transfer, and (4) reasonable cause on the part of the creditor then to believe that the enforcement of such transfer would effect a preference.

The findings of fact of the trial court establish (and they are not contested by the petitioner) that the Metropolitan Builders Supply Company was insolvent at the time of the receipt of the payments by the petitioner; that it gave no new consideration at that time; that it then had reasonable cause to believe that it was securing a preference. The petitioner argues, however, that the further finding

made by the court that the "payments made thereafter did effect a preference over other creditors of the same class" was based on an interpretation of the Bankruptcy Act by the Supreme Court of Massachusetts as set forth in the case of *Rubenstein* v. *Lottow*, 223 Mass. 227; that this decision was incorrect and should not have been followed by the Municipal Court of the City of Boston, as it was in conflict with the decisions of the Circuit Court of Appeals for the Eighth Circuit. The petitioner argues that the issues thereby presented are as follows:

> "(1) Whether the preferential character of a transfer of property is to be determined as of the date of the actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy.
>
> "(2) What is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class:
>
> "(a) What percentage creditors of the same class could have received at the date of the actual payment or transfer, or
>
> "(b) What other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate."

The respondent respectfully submits that the petitioner's statement of the supposed questions at issue is based on an erroneous assumption of fact, the absence of which fact destroys whatever argument the petitioner may have. The assumption made by the petitioner in its statement of the questions is that it assumes as a fact that, when the petitioner (or any creditor in any bankruptcy) receives a

payment on account within four months, it thereupon surrenders all rights to receive any further payments from the debtor or, in the event of bankruptcy, a dividend from the estate; in other words, that the partial payment on account is in full settlement of the claim as would be the case in bankruptcy distribution. This obviously is not so.

In order to make this point clear, the respondent submits to the court the following theoretical case:

Let us assume that a voluntary or involuntary petition in bankruptcy was filed against a corporation or individual on July 2, 1935. Let us assume further that a trustee in bankruptcy is appointed and brings a suit to recover a payment in the sum of $500 made to a creditor the day before the petition was filed. Let us assume that the court finds as a fact that the creditor's claim against the bankrupt on July 1st was $1000; that the debtor owed the creditors of the same class as the creditor who received the payment the sum of $10,000; and that the fair value of its assets as of July 1st was $5000. Let us further assume that the court has found as a fact that at the time of the payment the debtor was insolvent and that the creditor had reasonable cause to believe that it was securing a preference. On this set of facts the petitioner would argue that the trustee in bankruptcy could not recover the sum of $500 paid to the creditor, since it received but 50% of its claim and since at the time of the payment all creditors could have received 50% of their claims. Therefore, the petitioner argues, this creditor was not preferred.

It appears clear to the respondent that what is overlooked in this argument is that the $500 received by the creditor was not in payment of its full claim, but merely payment in full of that portion of its claim to which that $500 was applied and that it still has remaining to it the right to collect the remaining $500 from the debtor or, in the event of bankruptcy, to prove its claim for $500. Assume fur-

ther that the creditor after bankruptcy does file a proof of claim for $500 and it is fair to assume that at least a dividend of 30% will be paid to creditors after deduction of administration expenses. Thus this creditor would receive $500 before bankruptcy and $300 in bankruptcy, making a total of 80% of its $1000 claim, whereas all other creditors would receive a dividend of 30% of the same multiple of $1000.

This example is not as strong a case as the instant case, as in this case the creditor before bankruptcy received full payment of its account.

The mathematical argument above made is used as a basis for the decisions in the cases about to be cited.

In the case of *Bronx Brass Foundry Inc.* v. *Irving Trust Co.*, 76 Fed. (2d) 935 (C.C.A. 2d) the precise question argued by the petitioner in this case in its behalf was therein presented by the appellant. The court stated, in denying relief to the appellant, that "Whether a creditor of an insolvent has received an unlawful preference is not to be determined by what the situation would have been if the estate had been completely liquidated and distributed among all the creditors at the time when the alleged preferential payment was made, but upon whether the ultimate result of a payment by a known insolvent will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

In the case of *Commerce Guardian Trust Co.* v. *Devlin*, 6 Fed. (2d) 518, the court again refused to follow the argument as made by the petitioner in this case. The facts in that case were that on November 18, 1921, the bankrupt owed the creditor more than $14,000 for money loaned beginning in August, 1921. A petition in bankruptcy was filed on January 6, 1922, and adjudication was made on January 22, 1922. The assets of the bankrupt were found

to be approximately $12,000 and liabilities $25,000 on November 18th and November 30th, the dates on which payments were made. The bankrupt received a total of $6300 on these two dates. Counsel for the bank argued that, since the bank did not receive a greater proportion of its debt than other creditors could have received at the time of distribution, it had not been preferred. The court said in part:

> "We see no merit in the suggestion that the Bank got no greater percentage of its own claim (about 48%) than creditors generally would have had if we accept the estimates of the bookkeeper of 50%. The bank actually received 100% on $6,300. of its claim and if the preference were withheld would be entitled to receive on the balance of its claim the same percentage as other creditors of its class."

Although neither the petitioner nor the respondent in preparing their respective briefs for the Supreme Court of Massachusetts cited a decision on the point in issue, and although the Supreme Court of Massachusetts stated that it had been unable to find a decision, it appears to the respondent that this question has been decided by this Honorable Court in the case of *Eau Claire National Bank v. Jackman,* 204 U.S. 522, which case has recently come to his attention. In that case the petitioner alleged that the Supreme Court erred in the following particulars among others:

(*a*) In holding that a transfer made within four months of the bankruptcy proceedings, which enabled a creditor to receive any portion of his debt, constituted a preference.

(*b*) That although the effect of the transfer in question did not operate to give back a greater percentage of its debt than other creditors of the same class, such transfer constituted a preference.

The court's decision with reference to these arguments of counsel for the bank in part is as follows:

> "Their fundamental contention is that the transfers to the bank were not invalid as a preference if their enforcement would not operate to give the bank a greater percentage of its debt than other creditors of the same class would receive. And such, it is further contended, was not the result, and it is intimated that claims of possible and fictitious creditors were in effect considered. But this contention encounters the fact found by the jury and the trial court. We have already seen what, in the opinion of the trial court, the evidence established as to the effect of the transfers, and the jury found that Young was insolvent at the time they were made, and that the purpose of their execution was to give the bank a preference and to enable it to obtain a greater percentage of its debt than other creditors of Young of the same class. These findings were not disturbed by the Supreme Court, and we must accept them as stating the facts established by the evidence, although counsel seem to invoke an examination by us of the record against them. Taking them as true, they show a case of preference and grounds to set it aside."

Throughout the discussion in the above-cited case it appears to be assumed that the distribution referred to by the Bankruptcy Act is the distribution which would be secured by creditors out of the assets of the bankrupt estate, and not what amount could have been received by other creditors at the time of distribution. Cases too numerous to cite can be given in support of the decisions of the Supreme Court of Massachusetts which are contrary to the argument of the petitioner.

Baker v. *Chisholm,* 268 Mass. 1, at 7.

Rubenstein v. *Lottow*, 223 Mass. 227.
LaTrobe v. *Cross*, 29 Fed. (2d) 210.
Williams v. *Bank of America Nat. Assoc.*, 55 Fed. (2d) 884.
Swartz v. *Fourth National Bank*, 117 Fed. 1, at 7.
In re Watkinson, 146 Fed. 142.
In re Mayo Contracting Co., 157 Fed. 469.
In re Carlton Export & Import Co., 121 Fed. 663.
Cohen v. *Goldman*, 250 Fed. 599.
In re Star Spring Bed Co., 265 Fed. 133.
Eyges v. *Boylston National Bank*, 294 Fed. 286.

In the case of *Swartz* v. *Fourth National Bank*, 117 Fed. 1, the court said in part:

> "The statement of these facts is in itself a demonstration that if the Bank can retain this money and procure the allowance of the balance of its claim, it will receive a greater percentage of its debt out of the estate of the insolvent than other creditors of its class who receive no such payment."

Apart from the arguments of law already given supporting the rule of law adopted by the Supreme Judicial Court of Massachusetts, and followed in this case, there are numerous practical arguments to be advanced in its favor. It would place an almost insurmountable hurdle in the way of a trustee in bankruptcy to call upon him to prove that creditors at the time of each payment could not have received the same proportionate distribution that the preferred creditor did receive. Obviously, in bankruptcy, the records of assets and liabilities are not too easily available.

Furthermore, it might prevent the recovery of any preference. Suppose a creditor were to receive over a period

of thirty days just prior to bankruptcy payments daily of $100, and let us assume that its total claim was $3000, so that it received payment in full, and let us suppose further that the assets of the debtor during the month prior to bankruptcy, during which these payments were made, were sufficient to pay all creditors 50 cents on the dollar: Would the petitioner have the court refuse relief to the trustee in bankruptcy because at the time of each payment the creditor had received but 3⅓% of its claim? The very words of the Bankruptcy Act indicate no such intention. As stated by the Supreme Court of Massachusetts in the case of *Rubenstein* v. *Lottow*, 223 Mass. 227: "The pertinent words of the bankruptcy act . . . express futurity. Whether 'the effect of the enforcement' of the transfer 'will be to enable' one creditor to get a larger percentage of his debt than other like creditors, by implication reaches forward to a time when an authoritative distribution can be made." "The interpretation urged would result in inequality of distribution of the debtor's assets among his creditors. Equality of distribution is one of the fundamental objects of a bankrupt law."

The only reason advanced by the petitioner for this court's taking jurisdiction is that there is apparent conflict between the rule as set forth in Massachusetts and the rule as set forth by decisions of the Federal District Court of Kansas and Arkansas and the Circuit Court of Appeals of the Eighth Circuit. The petitioner claims further that the decision of the Circuit Court of Appeals of the Eighth Circuit is supported by the great weight of authority.

The respondent submits that there is no conflict between the cases, but, if there is a conflict, that the great weight of authority supports his contentions.

One of the most quoted cases in the law of preferences is that of *Swartz* v. *Fourth National Bank*, 117 Fed. 1. It

will be observed that this case was decided in the Circuit Court of Appeals for the Eighth Circuit. In that case the court said in part:

> "The statement of these facts is in itself a demonstration that if the Bank can retain this money and procure the allowance of the balance of its claim, it will receive a greater percentage of its debt out of the estate of the insolvent than other creditors of its class who receive no such payment. . . . The dominant purpose of the prohibition of a preference was not to benefit or injure, or to prevent the benefiting or injuring of any creditor or class of creditors, but to prevent the debtor from making any disposition of his property which would prevent its equal distribution—to prevent him from doing anything which would result in payment out of his property of a larger percentage upon any claim than others of the same class would receive. The plain intention of Congress and the legal effect of the paragraph (60a) was to make *every* transfer of any of the insolvent's property by means of which a larger percentage would be paid out of his estate to any creditor on any claim than every other creditor and every other claim of the same class would receive, a preference to be surrendered or avoided under the other provisions of the Statute" (60b).

The leading case, and one of the three cases cited by the petitioner in support of his argument, is that of *W. S. Peck & Co.* v. *Whitmer* (C.C.A. 8), 231 Fed. 893. That case cited with approval the case of *Swartz* v. *Fourth National Bank.* It does not support the petitioner's argument, but appears to the respondent, on the contrary, to support his argument. The question there decided was that on the facts of that particular case the trustee had failed to prove

the essential element found as a fact here, which is a necessary element of proof in every preference case, that is, that at the time of the receipt of the payments the debtor had reasonable cause to believe it was securing a preference. The court stated:

> "Taking the record as it stands, how could the appellant be held to have believed that if the estate of the bankrupt had been distributed at the time of the payments it would not have given every creditor a greater percentage of their debt than they were receiving? *The creditor who receives a partial payment on his debt, so far as the question of his having reasonable cause to believe that the enforcement of the payment would effect a preference, has a right to look at the bankrupt estate at the time payment is made.*"

The argument of the respondent as to the meaning of the finding in *Peck & Co.* v. *Whitmer,* is supported by a statement made in Gilbert's Collier on Bankruptcy (Third Edition), page 881, as follows:

> "The decision of Peck & Company vs. Whitmer is stated to be that on the particular facts of the case the creditor at the time they received the payment did not have reasonable cause to believe that a preference would result therefrom."

The case next cited by the petitioner in support of its argument is that of *Mansfield Lumber Co.* v. *Sternberg* (C.C.A. 8), 38 Fed. (2d) 614. Here again the court cites with approval the case of *Swartz* v. *Fourth National Bank,* (see *supra*). Here again the decision is based on a set of facts peculiar to that case. There the creditor received a total of 7.79% of its claim *and executed a general release.* The assets of the bankrupt paid to general creditors of the

same class 11%. It will be observed that the debtor here settled its entire claim for 7.79% and did not retain the right to prove the balance of its claim in bankruptcy. The court therefore found that "There was a failure of proof on the part of the Trustee that the transfer operated as a preference."

The last case cited by the petitioner in support of its argument is that of *Haas* v. *Sachs* (C.C.A. 9), 24 Am. B.R. (N.S.) 388. That case again cites with approval the earlier cases which your respondent submits do not sustain the petitioner's argument. Your respondent submits that the decision is not a clear one, and that, moreover, it contains a vigorous dissent.

It would appear, therefore, that the rule in the Eighth Circuit, at least until the confusing decision in the case of *Haas* v. *Sachs,* was in accordance with the decisions of every other circuit and with the great weight of authority. Without having cited any other cases, the petitioner would argue that the great weight of authority supports its argument. The respondent submits that the only case which the petitioner can quote which is apparently in support of its petition is that of *Haas* v. *Sachs,* which apparently conflicts with the decisions in every other Circuit Court of Appeals, and the great weight of authority in the federal courts and in the state courts. The respondent also submits that the case of *Haas* v. *Sachs* is not a clear decision and is in conflict with earlier rulings of the same circuit.

In commenting on the rule advanced by the petitioner, Judge Lowell, in the case of *Eyges* v. *Boylston National Bank,* 294 Fed. 286, stated:

> "This rule, however, has never been applied so far as I am aware, except where at the time of trial of the suit for an alleged preference it was clear that the same percentage would be paid to other creditors as to the one against whom the suit is brought."

The argument on which the petitioner places great weight in its brief to the effect, that, unless this court decides this question on this petition, business concerns will be left in "utter confusion," has little to support it. Apart from the fact that the respondent believes that the rule of law in question has already been settled in the case of *Eau Claire National Bank* v. *Jackman,* 204 U.S. 522, the principle enunciated by the Supreme Court of Massachusetts and sought for by the respondent is firmly settled by the great weight of authority.

The recovery of a preference is a proceeding which necessarily arises after the deed is done. Creditors who receive payments on account certainly do not do so, and have no obligation to do so, with their eyes directed toward the recovery of the payment by a possible subsequent trustee in bankruptcy. They have a valid claim and are entitled to receive whatever payments they can secure as they go along. The Bankruptcy Act, in order to effectuate equal distribution among creditors within four months, serves to make them return what they would otherwise be properly entitled to. How, then, can the rule of law in this case affect the course of conduct of a business man? He is entitled to secure his payments and will do so whatever rule be enunciated. The only person who will be guided is the trustee in bankruptcy. As to trustees, the respondent submits that they long have proceeded under the assumption that the rule urged by the respondent was established beyond question.

Conclusion.

While the respondent does not rely upon the jurisdictional argument to the effect that the petitioner has filed his application late, it appears to him that this argument is a sound one and that this petition should be dismissed on this preliminary ground.

If, however, the court is of the opinion that it has been applied for in time, then the respondent respectfully submits that it should be denied because (1) the ruling of law made at the trial, the correctness of which is the only issue raised by the petitioner in its brief, was immaterial and did not affect its substantial rights; (2) if it was not immaterial, the respondent submits that the ruling is in accordance with the law as decided in this court and with the great weight of authority in the federal and state jurisdictions which have been called upon to pass on the question herein submitted.

The respondent therefore respectfully prays that the petition for writ of certiorari be denied.

Respectfully submitted,

MATTHEW BROWN, Trustee in Bankruptcy of Metropolitan Builders Supply Company,

By his Attorneys,

Harrison J. Barrett,

Matthew Brown.

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Supreme Court of the United States.

October Term, 1935.

No. 125.

Palmer Clay Products Company,
Petitioner,

v.

Matthew Brown, Trustee,
Respondent.

BRIEF FOR RESPONDENT.

HARRISON J. HARRETT,
MATTHEW BROWN,
Attorneys for Matthew Brown, Trustee in Bankruptcy of Washington Builders Supply Company.

Appeal (J. Williams & Son, Law Printers, Inc.)

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Supreme Court of the United States.

OCTOBER TERM, 1935.

No. 125.

PALMER CLAY PRODUCTS COMPANY,
Petitioner,
v.
MATTHEW BROWN, TRUSTEE,
Respondent.

RESPONDENT'S BRIEF.

Statement of the Case.

The facts involved in this appeal are set forth in detail in the Transcript of Record which accompanied the writ of certiorari filed by the petitioner in this case, and will be referred to as the Transcript of Record.

The Metropolitan Builders Supply Company was adjudicated a bankrupt under an involuntary petition in bankruptcy filed against it on January 14, 1933, and the respondent was duly elected trustee in bankruptcy on the 28th day of February, 1933. On November 8, 1932, the petitioner was a general unsecured creditor of the Metropolitan Builders Supply Company for merchandise sold prior thereto in a total sum of $2088.29. No merchandise was sold by the petitioner to the bankrupt after November 8, 1932. (See Transcript of Record, page 11, line 10.)

Between November 8, 1932, and January 3, 1933, the petitioner received, in full payment of its balance due, the sum of $2088.29, receiving $1688.29 from the Metropolitan

Builders Supply Company on the following dates, and in the following amounts:

November 25, 1932,	$143.64
November 25, 1932,	4.79
December 6, 1932,	425.94
December 13, 1932,	654.91
December 29, 1932,	459.01

and, in addition thereto, received the sum of $400 on December 5, 1932, from Louis B. Cadario & Son, a third party, from whom the petitioner had, prior thereto, received a guarantee, the said guarantor having received no security or right to any of the assets of the said Metropolitan Builders Supply Company for the giving of said guarantee to the purchaser. Suit was brought by the respondent to recover these payments as preferential; and, after hearing, the trial justice of the Municipal Court of the City of Boston found for the respondent in the sum of $1688.29, and made the following findings of fact:

> "I find that on November 8, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders Supply Company was insolvent and 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class." (See Transcript of Record, page 13.)

The petitioner filed certain requests for rulings. The trial justice denied its request for ruling No. 8, which was as follows:

> "The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class

could at the time of each payment have received." (See Transcript of Record, page 19.)

Following the above finding, the petitioner requested the Appellate Division of the Municipal Court of the City of Boston to report the case to the Supreme Judicial Court of Massachusetts. The Appellate Division refused to report the case, dismissing the petitioner's request. (See Transcript of Record, page 5.)

Thereupon, the petitioner filed its claim of appeal from this ruling to the Supreme Judicial Court of the Commonwealth of Massachusetts. That Court, after hearing, sustained the ruling of the Appellate Division, stating that in its opinion no error of law had been committed by the Trial Court in denying the plaintiff's request for ruling No. 8.

Statement of the Issues.

The sole question presented to the Supreme Judicial Court of Massachusetts by the petitioner on appeal was the correctness of the refusal of the trial justice to grant its request for ruling No. 8. It was the petitioner's contention that, while the Supreme Court of Massachusetts had decided this question adversely to it in accordance with its ruling in the case of *Rubenstein* v. *Lottow*, 223 Mass. 227, the refusal to grant this request was in conflict with the law as apparently set forth in certain Circuit Court of Appeals decisions of the Eighth Circuit. The petitioner, in its brief annexed to its petition for writ of certiorari, filed in this Court, set forth that in its opinion the issues raised were as follows:

"(1) Whether the preferential character of a transfer of property is to be determined as of the date of the actual transfer, or as of some future time, viz., the time of the filing of the petition in bankruptcy.

"(2) What is the test to be applied in determining whether a creditor, who is alleged to have received a preferential transfer, has received a greater percentage of its debt than other creditors of the same class.

"(*a*) What percentage creditors of the same class would have received at the date of the actual payment or transfer, or

"(*b*) What other creditors of the same class received at some future time, viz., the time of the filing of the petition in bankruptcy or final administration of the bankrupt estate.

"(3) Whether or not the Massachusetts State Courts acted erroneously in refusing the Petitioner's request for ruling of law, which was as follows:—

" 'The burden is on the plaintiff to prove that each of the payments received by the defendant had the effect of enabling the defendant to receive a greater percentage of its claim than other creditors of the same class could at the time of each payment have received.' "

This is the question of law that the petitioner would present to this Court as the basis for its appeal.

It is the respondent's contention that the findings of fact made by the Trial Court make the determination of the above questions of law immaterial, and that therefore the verdict of the Trial Court must stand, regardless of this Court's decision on this question of law.

It is the respondent's contention, further, that if the question of law is open on appeal, then the decision of the Supreme Judicial Court of Massachusetts in this case affirming the rule laid down by it in *Rubenstein* v. *Lottow*, 223 Mass. 227, to wit, That the question as to whether or not a creditor of an insolvent debtor has received a preference under sections 60*a* and 60*b* of the Bankruptcy Act is

to be determined by ascertaining if the ultimate result and effect of the enforcement of the transfer will be to enable such creditor to obtain a greater percentage of his debt than any other creditor of the same class will receive from the bankrupt estate, should be affirmed.

The pertinent sections of the Bankruptcy Act, Act of July 1, 1898, c. 541, 30 U.S. Sts. at Large, 544, 562, as amended by Act of February 5, 1903, 32 U.S. Sts. at Large, 799, c. 487, sec. 13, and by Act of June 25, 1910, 36 U.S. Sts. at Large, 842, c. 412, sec. 11, which are called in question are as follows:

"Sec. 60, Preferred Creditors.

"(*a*) A person shall be deemed to have given a preference, if, being insolvent, he has, within four months before the filing of the petition, or after the filing of the petition and before the adjudication procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the *effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.* Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of recording or registering of the transfer, if by law such recording or registering is required or permitted.

"(*b*) If a Bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing

thereof and before the adjudication, the bankrupt be insolvent, and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person. And for the purpose of such recovery any court of bankruptcy, as hereinbefore defined, and any state court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction."

Argument on the Merits.

I. The facts found by the Trial Court make the determination of the question of law sought to be raised by the petitioner immaterial, and therefore the finding of the Trial Court should stand even if the question of law was erroneously ruled upon.

We start off with the indisputable principle of law that the findings of fact as made by the Trial Court are final on appeal to this Court. The petitioner had adequate opportunity in the Court below, by requests for rulings and exceptions to the findings of fact, to protect its rights on this issue.

It cannot here attempt to argue that the findings are erroneous or not supported by the evidence or endeavor to introduce additional facts.

Reid v. *Doherty*, 273 Mass. 388.
Richards v. *Appley*, 187 Mass. 521.
Hedrich v. *A., T. & S.F. Railroad Co.*, 167 U.S. 673, 677.
Bement v. *National Harrow Co.*, 186 U.S. 70, 83.
Jenkins v. *Neff*, 186 U.S. 230.

As was stated by this Court in the case of *Kaufman* v. *Tredway*, 195 U.S. 271, which dealt with a question of preference—

> "Whether the bankrupt was insolvent when he paid the money to his brother, and whether the latter had reasonable cause to believe that it was intended thereby to give a preference, are questions of fact, determined by the verdict of the jury, and not open to review in this court."

The petitioner therefore cannot here argue for the first time that it was a secured creditor having a guarantee from a third person, or that no evidence was introduced as to what percentage of their claims could be paid to all creditors of the petitioner's class on the dates when the various payments were made, nor as to what dividends were paid to creditors generally.

And, even if it could, it is obvious that the holding by the petitioner of a guarantee of a third person did not place it in a different class from all other general unsecured creditors, there being only two classes of creditors in bankruptcy distribution—(1) Those entitled to be paid in full as priority creditors, and (2) Those creditors who are entitled to equal distribution after priority claims have been paid, and this without regard to whether they are secured or unsecured creditors.

Swartz v. *Fourth National Bank*, 117 Fed. 1 (C.C.A. 8th).
Livingston v. *Heineman*, 120 Fed. 786.
Gorman v. *Wright*, 136 Fed. 164.

The Trial Court has here found as a fact that "on November 8th, 1932, and thereafter, the defendants had reasonable cause, 1st, to believe that the Metropolitan Builders

Supply Company was insolvent, and 2nd, that payments made thereafter to them by the said Metropolitan Builders Supply Company would effect a preference over other creditors of the same class."

In the case of *Eau Claire National Bank* v. *Jackman*, 204 U.S. 522, 534, *et seq.*, a suit was brought by the trustee in bankruptcy to recover a preferential payment from the Eau Claire National Bank under sections 60*a* and 60*b* of the Bankruptcy Act. In that case the Trial Court found as a fact that certain transfers of property were made to the bank by the bankrupt, and that the bank, when receiving the payments, had reasonable cause to believe that the bankrupt intended to give such a preference "to enable it to obtain a greater percentage of its indebtedness than any other of his [the bankrupt's] creditors of the same class would be enabled to obtain." The petitioner attempted in this Court to raise certain questions of law which it claimed had been erroneously ruled upon by the Trial Court, to wit:

(*a*) In holding that a transfer made within four months of the bankruptcy proceedings, which enabled a creditor to receive any portion of his debt, constituted a preference.

(*b*) That, although the effect of the transfer in question did not operate to give back a greater percentage of its debt than other creditors of the same class, such transfer constituted a preference.

This Court refused to consider such assignments of error, stating the following:

"On the merits of the case we start with the facts established against the bank, that the property of Young [the bankrupt], at the time he executed the chattel mortgages and when he executed the deed to the lumber company, at a fair valuation, was insufficient to

pay his debts, and that by the execution of those instruments and the transfer of his property effected thereby, he intended to give the bank a preference over his other creditors, and that the bank had reasonable cause to believe that he intended thereby to give it a preference, and to enable it to obtain a greater percentage of its debt than any other creditor of Young of the same class. These, then, are the prominent facts, and seemingly justified the judgment. . . ."

"Their fundamental contention is that the transfers to the bank were not invalid as a preference if their enforcement would not operate to give the bank a greater percentage of its debt than other creditors of the same class would receive. And such, it is further contended, was not the result, and it is intimated that claims of possible and fictitious creditors were in effect considered. But this contention encounters the facts found by the jury and the trial court. We have already seen what, in the opinion of the trial court, the evidence established as to the effect of the transfers, and the jury found that Young was insolvent at the time they were made, and that the purpose of their execution was to give the bank a preference and to enable it to obtain a greater percentage of its debt than other creditors of Young of the same class. These findings were not disturbed by the Supreme Court, and we must accept them as stating the facts established by the evidence, although counsel seem to invoke an examination by us of the record against them. Taking them as true, they show a case of preference and grounds to set it aside."

If, then, this Court in the Eau Claire National Bank case stated that the findings of fact in that case justified the judg-

ment, then it would appear to the respondent that here too the findings of fact justified the judgment, and that the questions of law presented are immaterial.

Dutcher v. *Wright*, 94 U.S. 553, at 557.

Assuming, however, that the findings of fact do not in themselves warrant this Court's permitting the judgment to stand, the respondent submits that the evidence appearing in the transcript of the record before this Court, rendered the petitioner's request for ruling No. 8 immaterial. Therefore the ruling of the trial justice, refusing to grant this request, was not prejudicial to the petitioner even if it was erroneous ruling, and should not result in a reversal of the Trial Court's finding by this Court.

The payments received by the petitioner in this case total the full amount of its claim, to wit, $2088.29, it having received the sum of $1688.98 directly from the bankrupt corporation, $1500 of this amount having been received by the petitioner between November 25 and December 29, 1932, a period of approximately thirty days. (See Transcript of Record, page 12.)

The transcript of the record contains (see pages 15 and 16) two balance sheets of the Metropolitan Builders Supply Company as of November 1, 1932, and December 1, 1932. The transcript of the record indicates that if the assets, taken at their fair market value, had been distributed *pro rata* among creditors on November 1, 1932, almost thirty days prior to the first payment to the petitioner in this case, creditors would have received approximately 70% of their claims. (See Transcript of Record, pages 7 and 8.)

If the assets had been distributed on December 1, 1932, creditors of the same class as the petitioner would have received approximately 50% of their claims. If the assets had been distributed on or about January 14, 1933, credi-

tors would have received approximately 20%. (See Transcript of Record, page 8.)

It is obvious that if distribution had been made at intervening times between December 1, 1932, and January 14, 1933, creditors would have received somewhere between 50% and 20%, depending upon how near to December 1, 1932, the distribution was made.

Since the record indicates that the payments were made to the petitioner between November 25, 1932, and January 3, 1933, it would appear fair, in estimating what could have been paid to creditors at the date of each payment, to ascertain what the average distribution would have been between these dates. This figure would have been approximately 40% between November 25 and December 15, and approximately 25% between December 15 and December 29, 1932, bearing in mind the rapidity of the shrinkage of the assets.

The petitioner actually received from the bankrupt corporation during this period approximately 80% of its claim, each of the payments made in December being a larger percentage than could probably have been then paid to other creditors of the same class if the assets had been distributed at the time of each payment. And since these payments were so close, should they not as a matter of fact be considered in the nature of one payment? Is it not therefore clear that, even under the rule sought to be established by the petitioner, it has received a larger percentage of its debt than could have been paid to other creditors at the time it received the payments, and therefore it suffered no prejudicial error in the failure of the Trial Court to grant a request based on this proposition of law?

It would appear proper, therefore, in accordance with principles of justice, to hold that the refusal by the Court to grant a request rendered immaterial by the facts should not be ground for the overturning of a decision arrived at after

a hearing and a mature consideration of the facts. And the law appears to support such a conclusion.

(See section 269 of the Judicial Code of the United States.)

The rule is enunciated in many cases that, even though an error of law is committed in the conduct or disposition of a case, if substantial justice was done the parties, and the error was immaterial, the finding should be allowed to stand.

Eau Claire National Bank v. *Jackman,* 204 U.S. 522, 534, *et seq.*
Virginia R.R. & Power Co. v. *Smith & Hicks, Inc.,* 105 S.E. 532 (Va.).
Green v. *Ruffin,* 125 S.E. 742 (Va.).
West v. *United States,* 258 Fed. 413.
Ashapa v. *Reed,* 280 Mass. 514, at 516.
Indiana Farmer's Guide Publishing Co. v. *Prairie Farmer Publishing Co.,* 293 U.S. 268.
Gigoux v. *Henderson,* 107 Kans. 325.
Queeney v. *Willis,* 225 N.Y. 374.
Stevens v. *Ross,* 1 Calif. 94, at 98.

The respondent therefore respectfully submits that the findings of the Trial Court, as supported by the evidence appearing in the transcript of record, preclude the necessity of this Court's passing on the question of law the petitioner would present, and that the judgment should be allowed to stand.

II. The decision of the Supreme Judicial Court of Massachusetts in this case sustaining the rule of law sought for by the respondent was in accordance with the spirit and purpose of the Bankruptcy Act and is supported both by the authorities and on principle.

In order properly to approach the question here involved, which is one of statutory interpretation of sections 60*a* and 60*b* of the Bankruptcy Act, the respondent submits that it is necessary to ascertain the principles and purposes of the Bankruptcy Act.

At common law it was the diligent creditor who was favored. This principle came to be inadequate in the doing of justice in the cases of insolvency in this period of large commercial dealings on credit. The Bankruptcy Law is founded upon entirely different principles. Under that Act the maxim "Equality is equity" governs. The essential principle of the Bankruptcy Law is that all of the bankrupt's property be divided equally, without preference, to the payment of his debts. The insolvent estate is therefore, in theory, a trust fund. It is no longer the property of the bankrupt, for the moment that he becomes insolvent he ceases to be using up his own capital, and therefore, at the moment of insolvency, equity, in the form of Bankruptcy Law, steps in and claims his property a trust fund belonging to all his creditors. (See Remington on Bankruptcy (3d edition), vol. 4, sec. 1625, *et seq.*)

In re Mayo Contracting Co., 157 Fed. 469.
Walker v. *Wilkinson*, 296 Fed. 850, at 852.
Farnsworth v. *Union Trust & Deposit Co.*, 272 Fed. 92, at 94.
Richmond Standard Steel Spike & Iron Co. v. *Allen*, 148 Fed. 657, at 661.
In re Keller, 109 Fed. 118, at 122.
Swartz v. *Fourth National Bank*, 117 Fed. 1.

Clarke v. *Rogers*, 228 U.S. 534.
Keppel v. *Tiffin Saving Bank*, 197 U.S. 356, at 361.
In re Schafer, 5 A.B.R. 146.

The respondent respectfully submits that under the rule of law contended for by the petitioner, to wit, That a creditor is not preferred if at the time of each payment it received no greater percentage of its claim than other creditors could have received if the assets had been distributed at that moment, a patent inequality of distribution will result, which conflicts with the above principles on which the Bankruptcy Act is based.

III. It is obvious that one of the two assumptions must be made if inequality is not to result: (1st) that other creditors did receive the proportionate payment that the favored creditor did at the time of the payment, or (2d) that the creditor receiving the payment accepted it in full settlement.

Under the rule contended for by the petitioner, it appears to make no difference whether either of the assumptions is supported by the facts of the particular case. A creditor retains the right to prove a claim in bankruptcy and share equally with other creditors in the later distribution of the assets. In fact, under the petitioner's rule, it becomes immaterial to determine whether the creditor did accept the payment in full settlement or whether other creditors did receive the same proportionate payment as the favored creditor. Obviously, then, under the petitioner's rule, a creditor could receive preferential treatment and the trustee in bankruptcy would be powerless to correct the situation. In order to make this point clear, the respondent submits to the Court the following theoretical case:

Let us assume that a voluntary or involuntary petition in bankruptcy was filed against a corporation or individual on July 2, 1935. Let us assume further that a trustee in bankruptcy is appointed and brings a suit to recover a payment of the sum of $500 made to a creditor the day before the petition was filed. Let us assume that the Court finds as a fact that the creditor's claim against the bankrupt on July 1st was $1000; that the debtor owed the creditors of the same class as the creditor who received the payment the sum of $10,000; and that the fair value of its assets as of July 1st was $5000. Let us further assume that the Court has found as a fact, as in the principal case, that at the time of the payment the debtor was insolvent and that the creditor had reasonable cause to believe that it was securing a preference. On this set of facts the petitioner would argue that the trustee in bankruptcy could not recover the sum of $500 paid to the creditor, since it received but 50% of its claim and since at the time of the payment all creditors could have received 50% of their claims. Therefore, the petitioner argues, this creditor was not preferred.

It appears clear to the respondent that what is overlooked in this argument is that the $500 received by the creditor was not in payment of its full claim, but merely payment in full of that portion of its claim to which that $500 was applied, and that it still has remaining to it the right to collect the remaining $500 from the debtor or, in the event of bankruptcy, to prove its claim for $500. Assume further that the creditor after bankruptcy does file a proof of claim for $500, and it is fair to assume that at least a dividend of 30% will be paid to creditors after deduction of administration expenses. Thus this creditor would receive $500 before bankruptcy and $300 in bankruptcy, making a total of 80% of its $1000 claim, whereas all other creditors would receive a dividend of 30% of the same multiple of $1000.

Numerous cases have been decided by the Courts involving a set of facts similar to that assumed above, in which this very question of law is raised. The courts have rightly said that to allow a creditor to retain the payment would result in violation of every principle of the Bankruptcy Act.

Commerce Guardian Trust Bank v. *Devlin*, 6 Fed. (2d) 535.
Farnsworth v. *Union Trust & Deposit Co.*, 272 Fed. 92, at 94.
Keppel v. *Tiffin Savings Bank*, 197 U.S. 356, at 361.
In re Keller, 109 Fed. 118, at 122.
Harry J. Jentzer, Trustee in Bankruptcy of Yarns Corporation of America v. *Viscos Co. et als.*, U.S. Dist. Court for the So. Dist. of N.Y. in Equity, 73-157, 1935.
Rubenstein v. *Lottow*, 223 Mass. 227.
Latrobe v. *J. H. Cross Co. Inc.*, 29 Fed. (2d) 210.
Williams v. *Bank of America Nat. Assoc.*, 55 Fed. (2d) 884.
Swartz v. *Fourth National Bank*, 117 Fed. 1, at 7.
In re Watkinson, 146 Fed. 142.
In re Mayo Contracting Co., 157 Fed. 469.
In re Colton Export & Import Co., 121 Fed. 663.
Cohen v. *Goldman*, 250 Fed. 599.
Painter v. *Napoleon Tp.*, 156 Fed. 289.
Bronx Brass Foundry Inc. v. *Irving Trust Co.*, 76 Fed. (2d) 935.
In re Star Spring Bed Co., 265 Fed. 133.
Eyges v. *Boylston National Bank*, 294 Fed. 286.

And there are a large number of cases not here cited in which the Court assumed the rule of law contended for by

the respondent in making its decision. In fact, it would appear that this Court did so in the cases of—

Eau Claire National Bank v. *Jackman,* 204 U.S. 522.

Clarke v. *Rogers,* 228 U.S. 534.

As was well stated in the case of *Bronx Brass Foundry Inc.* v. *Irving Trust Co.,* 76 Fed. (2d) 935 (C.C.A. 2d):

> "Whether a creditor of an insolvent has received an unlawful preference is not to be determined by what the situation would have been if the assets had been completely liquidated and distributed among all the creditors at the time when the alleged preferential payment was made, but upon whether the ultimate result of a payment by a known insolvent will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class."

And again, in the case of *Commerce Guardian Trust Bank* v. *Devlin,* 6 Fed. (2d) 518, 535, the Court stated:

> "We see no merit in the suggestion that the bank got no greater percentage of its claims (about 48%) than creditors generally would have had if we accept the estimates of the bookkeeper of 50%. The bank actually received 100% on $6,300. of its claim and if the preference were withheld would be entitled to receive on the balance of its claim the same percentage as other creditors of its class."

This principle of interpretation would appear to be borne out by the wording of section 60*a* of the Bankruptcy Act, which states that "A person shall be deemed to have given a preference if . . . he has . . . made a transfer of any of

his property and the *effect of the enforcement of such . . . transfer will be to enable* any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class." Obviously this section expresses futurity and is looking forward to a later date, *i.e.*, bankruptcy, to determine the effect of the payment.

The petitioner would argue, however, that the wording of section 60*b* conflicts with the foregoing interpretation of the Act. The respondent submits that the words in section 60*b*—"*The transfer then operate as a preference*" must be interpreted in the light of what section 60*a* defines as a preference, *i.e.*, a transfer which will ultimately result in one of the bankrupt's creditors obtaining a greater percentage of his debt than other creditors of the same class. In other words, the receipt of a payment on account by a creditor, since it pays in full a portion of his claim, leaving him in a position to compete with the remaining creditors on an equal basis, *does* "then operate as a preference."

But, says the petitioner, if at the time of payment all creditors could have received a like percentage on their claims as the creditor who actually did receive a payment, where we do find satisfied the requirements of section 60*b* that the creditor shall "then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference"?

The respondent submits that if a creditor at the time of a payment knows, or has reasonable cause to believe, that the debtor making the payment is insolvent, he must know that by receiving full payment of that portion of his account which is paid, and retaining the right to prove his claim for the balance along with other creditors of the same class, he is then being preferred. To argue that "reasonable cause to believe" must mean reasonable cause to believe he is securing a greater percentage than other creditors could then have gotten is to affirm the conclusion. Is this

not clear from the very wording of section 60*b*, which does not provide that the creditors shall have reasonable cause to believe that at the time of the payment he is being preferred, but that the creditor shall then have "reasonable cause to believe that the *enforcement* of such judgment or transfer *would effect* a preference"? These latter words are likewise looking to the future effects of the enforcement of the transfer in the event of bankruptcy.

Ogden v. *Reddish*, 200 Fed. 977.

In fact, request No. 8 of the petitioner appears to do so. Does this mean that under the rule contended for by the respondent all payments on account by an insolvent within four months of bankruptcy are preferential and voidable by the trustee? The answer is "No." Two situations occur to the respondent, and there may be others, under which a payment would not appear to be preferential—(1) Where the payment made was no larger than other creditors could have received at the time of payment and is then accepted by the creditor in full payment and release of all future rights to collect the balance of its claim, and (2) Where, at the time of the payment to the particular creditor, all creditors were actually paid a proportionate share of their indebtedness.

It is interesting to note that the principal cases cited by the petitioner in support of its argument, some of which are hereinafter cited, quote with approval in their opinions the case of *Swartz* v. *Fourth National Bank*, 117 Fed. 1. In that case the Court said, in part:

> "The statement of these facts is in itself a demonstration that if the Bank can retain this money and procure the allowance of the balance of its claim, it will receive a greater percentage of its debt out of the estate of the insolvent than other creditors of its class who receive no such payment."

The case of *Peck & Co.* v. *Whitmer* (C.C.A. 8th), 231 Fed. 893, cites with approval the case of *Swartz* v. *Fourth National Bank,* as does the decision in the case of *Mansfield Lumber Co.* v. *Sternberg* (C.C.A. 8), 38 Fed. (2d) 614, and *Haas* v. *Sachs* (C.C.A. 9), 24 Am. B.R. (N.S.) 388. It is further interesting to note that, in the case of *Mansfield Lumber Co.* v. *Sternberg,* the creditor received a total of 7.79% of its claim *and executed a general release.* The assets of the bankrupt paid to general creditors of the same class 11%. It will be observed that the debtor here settled its entire claim for 7.79% and did not retain the right to prove the balance of its claim in bankruptcy. The Court therefore found that "there was a failure of proof on the part of the trustee that the transfer operated as a preference." And in the case of *Haas* v. *Sachs* the evidence seems to establish that at the time of the hearing the assets of the estate had been liquidated so as to award a dividend of 20% to creditors, whereas the money received by the creditor whose claim was objected to amounted to 10% of his claim.

In referring to the cases of *Peck & Co.* v. *Whitmer,* and *Haas* v. *Sachs,* Patterson, D.J., in the case of *Jentzer* v. *Viscos Company et al.* (see *supra*) well stated:

> "In those cases sight seems to have been lost of the fact that the creditor who received the payment on account of his claim retained the balance of his claim for further collection on a parity with other creditors. The case was considered as if the creditor had dedicated the remaining assets to other creditors which was not the fact. The receiving creditor got more than other creditors and it was obvious all along that he would get more if the transfer should be sustained."

The establishment of the rule contended for by the respondent results in an assurance of equality of distribution. The establishment of the rule contended for by the petitioner

would result in the destruction of any such assurance. An example will illustrate the point.

Suppose a creditor is owed the sum of $1000 and that over a period of thirty days prior to the bankruptcy it receives ten payments each in the sum of $100, the payments being three days apart. Suppose further that, at the time of each payment, the debtor's assets, if then distributed, would have paid a dividend of 50% to all creditors of the same class. The petitioner would appear to argue that these payments were not preferential, since at the time of each payment the debtor received only 10% of its claim and therefore was not then preferred and could not then have reasonable cause to believe that it was being preferred. Actually, it received payment in full as a result of the payments. Would this Court, therefore, refuse relief to the trustee? Such a result certainly was not intended by the Bankruptcy Act, but would appear to follow under the rule contended for by the petitioner.

In addition to the arguments heretofore given, there are practical arguments in favor of the respondent's rule. As was well stated by the Supreme Court of Massachusetts in the case of *Rubenstein* v. *Lottow* (see *supra*) in commenting on the rule of law contended for by the respondent which was the same as that contended for by the petitioner here—

> "If the defendant's contention is sound, the bankruptcy court well might be required, in the case of successive preferences, to enter into prolonged investigations as to the precise ratio to each other of the bankrupt's debts and liabilities at numerous different dates within the four months' period preceding the filing of the petition. Such judicial investigations inevitably would cause expense to the public and to the trustee representing the other creditors, and could confer no advantage on the debtor. They could benefit no one

except a creditor who had accepted a preference, having reasonable cause to believe that he thereby was securing a preference from a bankrupt debtor. It cannot be presumed that such extreme solicitude at such cost would be manifested by the law for such a creditor, in the absence of words expressing an unmistakable purpose to that end. The words of the act disclose no such design. On the contrary, they tend in the opposite direction.

"The interpretation urged would result in inequality of distribution of the debtor's assets among his creditors. Equality of distribution is one of the fundamental objects of a bankrupt law. The indebtedness of a business man often gradually progresses from a nascent state of insolvency to the point where a petition in bankruptcy is filed. Beginning with a bare excess of debts over assets, he may go through the gamut to a very large and disproportionate excess in this respect. Preferences during such a period of declining ratio of assets to debts, adjusted according to the theory of the law now put forward, would result in a sliding scale of inequality between the various preferred creditors, as well as inequality between all creditors who have obtained preferences and the general creditors who depend upon the equality of the law to protect their interests against the alertness of creditors seeking unequal advantages through their own keenness in scenting approaching bankruptcy."

IV. If this Court shall determine that the interpretation given to sections 60a and 60b of the Bankruptcy Act by the Supreme Court of Massachusetts in deciding the principal case was erroneous, and that the findings of fact did not make this error immaterial, the respondent submits that this Court should remand this cause to the Trial Court for further hearing, to allow the introduction of evidence on the question as to whether or not at the time of each payment the petitioner was preferred under the amended interpretation which may be given to sections 60a and 60b of the Bankruptcy Act by this Court.

The respondent has proceeded from the first and properly under the assumption that the rule of law set forth by his own Supreme Court was correct and presented his evidence in accordance with the rule then existing. If it should now appear that this rule was not correct, it appears to the respondent that it would be working an injustice to prevent him from having the opportunity to represent to the Trial Court such evidence as will allow him to recover under the principles which may be enunciated by this Court. The evidence may well sustain a finding under either rule. Citation of cases is not needed on the point that it is within the right and power of this Court to remand a case to the Trial Court for new hearings if to do so will accomplish justice.

Conclusion.

The respondent respectfully submits that the principle of law contended for by him is correct and should be sustained by this Court; that in any event, under the rule of law contended for by either the petitioner or the respondent, the verdict is justified and should be allowed to stand, and that, in all events, if the principle of law contended for by the respondent is not correct, and the findings of fact do

not justify the verdict, the case should be remanded to the Trial Court for the hearing of evidence on the additional issues resulting from the reversal of the interpretation given to the relevant sections of the Bankruptcy Act by the Supreme Judicial Court of Massachusetts.

Respectfully submitted,

MATTHEW BROWN, Trustee in Bankruptcy of
METROPOLITAN BUILDERS SUPPLY COMPANY,
By his Attorneys,
HARRISON J. BARRETT,
MATTHEW BROWN.

SUPREME COURT OF THE UNITED STATES.

No. 125.—October Term, 1936.

Palmer Clay Products Company, Petitioner, *vs.* Matthew Brown, Trustee.	On Certiorari to the Municipal Court of the City of Boston, Massachusetts.

[February 10, 1936.]

Mr. Justice Brandeis delivered the opinion of the Court.

In the Municipal Court of Boston, Matthew Brown, trustee in bankruptcy of Metropolitan Builders' Supply Company, brought this action against Palmer Clay Products Company, to recover as preferences amounts received on account of an overdue debt. The court found as facts that the defendant had received several such payments within the four months preceding the filing of the petition in bankruptcy; and that at the time of each payment it had reasonable cause to believe that the debtor was insolvent, and also that such payment would effect a preference over other creditors of the same class. It refused to rule that the burden rested on the plaintiff to prove further that each payment had the effect of enabling the defendant to receive a greater percentage of its debt than other creditors of the same class could have received at the time of such payment if the assets had then been liquidated. Judgment for $1,843 was entered pursuant to the rescript of the Supreme Judicial Court of Massachusetts, — Mass. —, which, in approving the action of the trial court, followed *Rubenstein* v. *Lottow*, 223 Mass. 227. We granted certiorari, 296 U. S. —, because the decision, while in accord with *Bronx Brass Foundry, Inc.*, v. *Irving Trust Co.*, 76 F. (2d) 935, in the Second Circuit, and *Commerce-Guardian Trust & Savings Bank* v. *Devlin*, 6 F. (2d) 518, in the Sixth Circuit, conflicts with *W. S. Peck & Co.* v. *Whitmer*, 231 Fed. 893, and other cases in the Eighth Circuit.[1]

[1] See Mansfield Lumber Co. *v.* Sternberg, 38 F. (2d) 614; Haas *v.* Sachs, 68 F. (2d) 623. Also, Eyges *v.* Boylston Nat. Bank, 294 Fed. 286 (D. Mass.); Jentzer *v.* Viscose Company (S. D. N. Y.), — Fed. Supp. —.

The question for our determination is the construction to be given to §§ 60 (a) and (b) of the Bankruptcy Act.[2] The petitioner contends that a creditor who receives a part payment of his claim does not receive a preference, although he has reason to believe that the debtor is insolvent, provided the debtor's assets at the time of the payment would, if then liquidated and distributed, be sufficient to pay all the creditors of the same class an equal proportion of their claims.

Whether a creditor has received a preference is to be determined, not by what the situation would have been if the debtor's assets had been liquidated and distributed among his creditors at the time the alleged preferential payment was made, but by the actual effect of the payment as determined when bankruptcy results. The payment on account of say 10% within the four months will necessarily result in such creditor receiving a greater percentage than other creditors, if the distribution in bankruptcy is less than 100%. For where the creditor's claim is $10,000, the payment on account $1000, and the distribution in bankruptcy 50%, the creditor to whom the payment on account is made receives $5500, while another creditor to whom the same amount was owing and no payment on account was made will receive only $5000. A payment which enables the creditor "to obtain a greater percentage of his debt than any other of such creditors of the same class" is a preference.

We may not assume that Congress intended to disregard the actual result, and to introduce the impractical rule of requiring the determination, as of the date of each payment, of the hypothetical question: What would have been the financial result if the assets had then been liquidated and the proceeds distributed among the then creditors?

Affirmed.

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[2] The applicable provisions are:

"Sec. 60 (a) A person shall be deemed to have given a preference if, being insolvent, he has, within four months before the filing of the petition . . . made a transfer of any of his property, and the effect of the enforcement of such . . . transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class.

"Sec. 60 (b) If a bankrupt shall have . . . made a transfer of any of his property, and if, at the time of the transfer . . . the bankrupt be insolvent and the . . . transfer then operate as a preference, . . . it shall be voidable by the trustee and he may recover the property or its value from such person."